

A N
A R G U M E N T
I N T H E C A S E O F
J A M E S S O M M E R S E T T
A N E G R O.

Wherein it is attempted to demonstrate
THE PRESENT UNLAWFULNESS
O F
DOMESTIC SLAVERY IN ENGLAND.

T O W H I C H I S P R E F I X E D
A S T A T E O F T H E C A S E.

By Mr. H A R G R A V E,
One of the COUNSEL for the NEGRO.

T H E S E C O N D E D I T I O N.

L O N D O N:

Printed for the A U T H O R:

And sold by W. OTRIDGE, opposite the New Church,
in the Strand; and G. KEARSLY, near Serjeant's-
Inn, Fleet-street.

M. DCC. LXXV.

{ Price Two Shillings.]

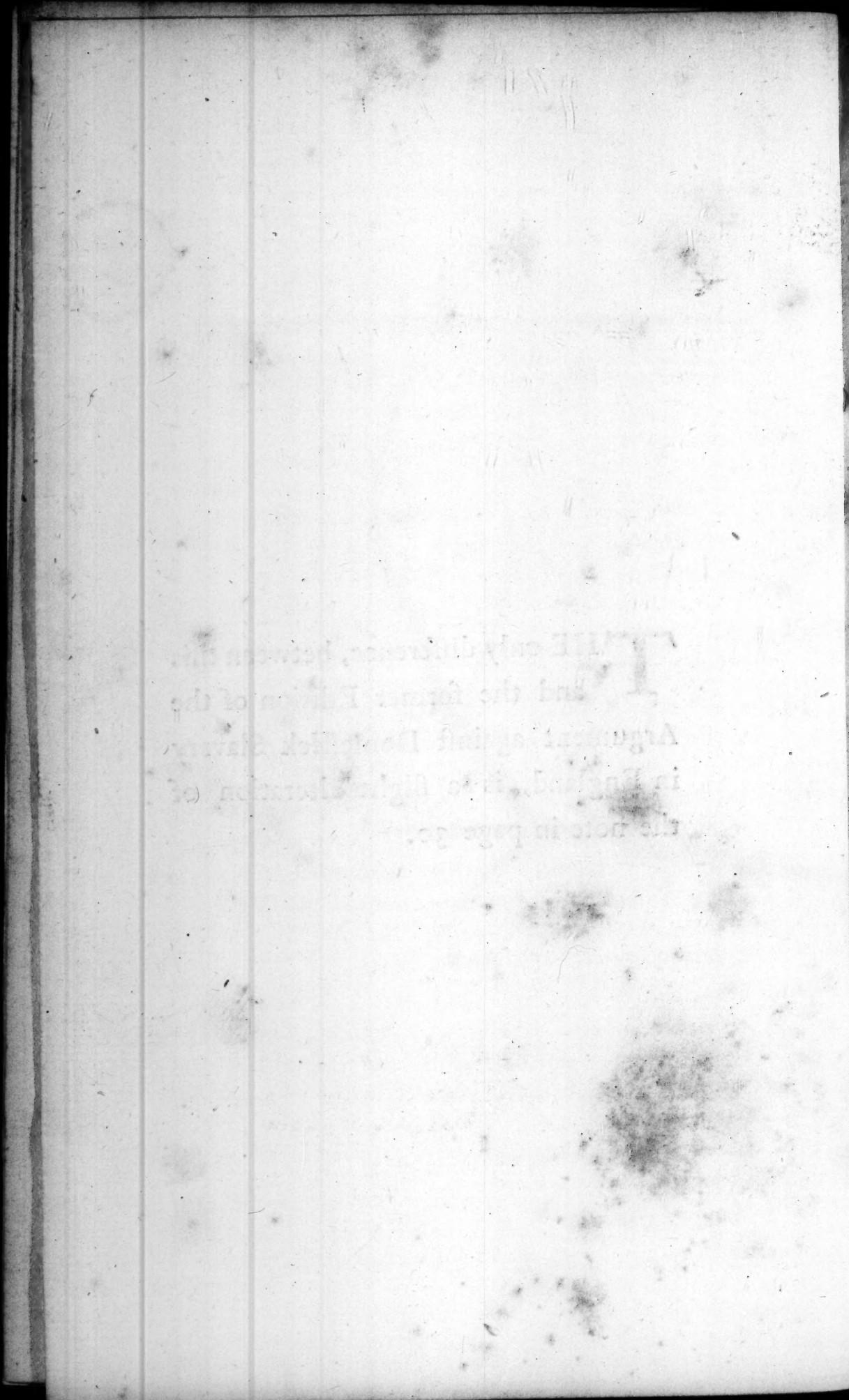
46

1 8.

478



THE only difference, between this
and the former Edition of the
Argument against Domestick Slavery
in England, is a slight alteration of
the note in page 30.



[+]

C A S E
O F

JAMES SOMMERSETT,
A N E G R O.

ON the 3d of December 1771, affidavits were made by Thomas Walklin, Elizabeth Cade, and John Marlow, that James Sommersett a negro was confined in irons on board a ship called the Ann and Mary, John Knowles commander, lying in the Thames, and bound for Jamaica; and Lord Mansfield, on an application supported by these affidavits, allowed a writ of *babeas corpus*, directed to Mr. Knowles, and requiring him to return the body of Sommersett before his lordship, with the cause of detainer.

Mr. KNOWLES on the 9th of December produced the body of Sommersett before Lord Mansfield, and re-

B turned

turned for cause of detainer, that Sommersett was the negro slave of Charles Steuart Esquire, who had delivered Sommersett into Mr. Knowles's custody, in order to carry him to Jamaica, and there sell him as a slave. Affidavits were also made by Mr. Steuart and two other gentlemen, to prove that Mr. Steuart had purchased Sommersett as a slave in Virginia, and had afterwards brought him into England, where he left his master's service; and that his refusing to return, was the occasion of his being carried on board Mr. Knowles's ship.

LORD MANSFIELD chusing to refer the matter to the determination of the Court of King's Bench, Sommersett with sureties was bound in a recognizance for his appearance there on the 2d day of the next Hillary term; and his lordship allowed till that day for settling the form of the return to the *babeas corpus*. Accordingly on that day Sommersett appeared in the Court of King's Bench, and then the following return was read:

" I JOHN KNOWLES, commander of the
 " vessel called the Ann and Mary in the writ here-
 " unto annexed, do most humbly certify and return to
 " our present most Serene Sovereign the King; that at
 " the time herein after-mentioned of bringing the said
 " James Sommersett from Africa, and long before,
 " there were, and from thence hitherto there have been,
 " and still are great numbers of negro slaves in Africa;
 " and

“ and that during all the time aforesaid there hath
“ been, and still is a trade, carried on by his Majesty’s
“ subjects, from Africa to his Majesty’s colonies or
“ plantations of Virginia and Jamaica in America,
“ and other colonies and plantations belonging to his
“ Majesty in America, for the necessary supplying of
“ the aforesaid colonies and plantations with negro
“ slaves ; and that negro slaves, brought in the course
“ of the said trade from Africa to Virginia and Ja-
“ maica aforesaid, and the said other colonies and
“ plantations in America, by the laws of Virginia
“ and Jamaica aforesaid and the said other colonies
“ and plantations in America, during all the time
“ aforesaid, have been, and are saleable and sold as
“ goods and chattels, and upon the sale thereof have
“ become and been, and are the slaves and property
“ of the purchasers thereof, and have been, and are
“ saleable and sold by the proprietors thereof as goods
“ and chattels. And I do further certify and return
“ to our said Lord the King, that James Sommersett,
“ in the said writ hereunto annexed named, is a negro,
“ and a native of Africa ; and that the said James
“ Sommersett, long before the coming of the said
“ writ to me, to wit on the 10th day of March in the
“ year of our Lord 1772 was a negro slave in Africa
“ aforesaid, and afterwards, to wit on the same day
“ and year last aforesaid, being such negro slave,
“ was brought in the course of the said trade as a
“ negro slave from Africa aforesaid to Virginia afore-
“ said, to be there sold ; and afterwards, to wit on

“ the 1st day of August in the year last aforesaid, the
“ said James Sommersett, being and continuing such
“ negro slave, was sold in Virginia aforesaid to one
“ Charles Steuart Esquire, who then was an inhab-
“ itant of Virginia aforesaid; and that the said
“ James Sommersett thereupon then and there became,
“ and was the negro slave and property of the said
“ Charles Steuart, and hath not at any time since
“ been manumitted, enfranchised, set free, or dis-
“ charged; and that the said James Sommersett, so
“ being the negro slave and property of him the said
“ Charles Steuart, and the said Charles Steuart hav-
“ ing occasion to transact certain affairs and busines-
“ s of him the said Charles Steuart in this kingdom,
“ he the said Charles Steuart, before the coming of
“ the said writ to me, to wit on the first day of Octo-
“ ber in the year of our Lord 1769, departed from
“ America aforesaid, on a voyage for this kingdom,
“ for the purpose of transacting his aforesaid affairs
“ and busines, and with an intention to return to
“ America, as soon as the said affairs and busines-
“ s of him the said Charles Steuart in this kingdom
“ should be transacted, and afterwards, to wit on
“ the 10th day of November in the same year, ar-
“ rived in this kingdom, to wit in London, that is
“ to say, in the parish of Saint Mary le Bow in the
“ ward of Cheap; and that the said Charles Steuart
“ brought the said James Sommersett, his negro slave
“ and property, along with him in the said voyage,
“ from America aforesaid to this kingdom, as the
“ negro

" negro slave and property of him the said Charles
" Steuart, to attend and serve him, during his stay
" and abiding in this kingdom, on the occasion afore-
" said, and with an intent to carry the said James
" Sommersett back again into America, with him
" the said Charles Steuart, when the said affairs and
" business of the said Charles Steuart should be trans-
" acted; which said affairs and business of the said
" Charles Steuart are not yet transacted, and the
" intention of the said Charles Steuart to return to
" America as aforesaid hitherto hath continued, and
" still continues. And I do further certify to our
" said Lord the King, that the said James Sommer-
" sett did accordingly attend and serve the said
" Charles Steuart in this kingdom, from the time
" of his said arrival, until the said James Sommer-
" sett's departing and absenting himself from the
" service of the said Charles Steuart herein aftermen-
" tioned, to wit at London aforesaid in the parish
" and ward aforesaid; and that before the coming
" of this writ to me, to wit on the 1st day of Octo-
" ber in the year of our Lord 1771, at London
" aforesaid, to wit in the parish and ward aforesaid,
" the said James Sommersett, without the consent,
" and against the will of the said Charles Steuart,
" and without any lawful authority whatsoever, de-
" parted and absented himself from the service of the
" said Charles Steuart, and absolutely refused to
" return into the service of the said Charles Steuart,
" and serve the said Charles Steuart, during his stay
" and

" and abiding in this kingdom, on the occasion
" aforesaid: WHEREUPON the said Charles Steuart
" afterwards and before the coming of this writ to
" me, to wit on the 26th day of November in the
" year of our Lord 1771, on board the said vessel
" called the Ann and Mary, then and still lying in
" the river Thames, to wit at London aforesaid, in
" the parish and ward aforesaid, and then and still
" bound upon a voyage for Jamaica aforesaid, did
" deliver the said James Sommersett unto me, who
" then was, and yet is master and commander of the
" said vessel, to be by me safely and securely kept and
" carried and conveyed, in the said vessel, in the
" said voyage to Jamaica aforesaid, to be there sold
" as the slave and property of the said Charles
" Steuart; and that I did thereupon then and there,
" to wit at London aforesaid in the parish and ward
" aforesaid, receive and take, and have ever since
" kept and detained the said James Sommersett in
" my care and custody, to be carried by me in the
" said voyage to Jamaica aforesaid, for the purpose
" aforesaid. And this is the cause of my taking and
" detaining the said James Sommersett, and whose
" body I have now ready, as by the said writ I am
" commanded."

AFTER the reading of the return, Mr. Serjeant Davy, one of the counsel for Sommersett the negro, desired time to prepare his argument against the return; and on account of the importance of the case,

the

the court postponed hearing the objections against the return, till the 7th of February, and the recognizance for the negro's appearance was continued accordingly. On that day Mr. Serjeant Davy and Mr. Serjeant Glynn argued against the return, and the further argument was postponed till Easter term, when Mr. Mansfield, Mr. Alleyne, and Mr. Hargrave, were also heard on the same side. Afterwards Mr. Wallace and Mr. Dunning argued in support of the return, and Mr. Serjeant Davy was heard in reply to them. The determination of the court was suspended till the following Trinity term ; and then the court was unanimously of opinion against the return, and ordered that Sommersett should be discharged.

THE following argument, on the behalf of the negro, is not to be considered as a speech actually delivered ; for though the author of it, who was one of the counsel for the negro, did deliver one part of his argument in court without the assistance of notes ; yet his argument, as here published, is entirely a written composition. This circumstance is mentioned, lest the author should be thought to claim a merit, to which he has not the least title.

A R G U M E N T
 FOR THE
 N E G R O.

THOUGH the learning and abilities of the gentlemen, with whom I am joined on this occasion, have greatly anticipated the arguments prepared by me; yet I trust, that the importance of the case will excuse me, for disclosing my ideas of it, according to the plan and order, which I originally found it convenient to adopt.

Short state of the Case. **T**HE case before the court, when expressed in few words, is this. Mr. Steuart purchases a negro slave in Virginia, where by the law of the place negroes are slaves, and saleable as other property. He comes into England, and brings the negro with him. Here the negro leaves Mr. Steuart's service without his consent; and afterwards persons employed by him seize the negro, and forcibly carry him on board a ship bound to Jamaica, for the avowed purpose of transporting him to that island, and there selling him as a slave. On an application by the negro's friends, a writ of habeas corpus is granted; and in

obe-

obedience to the writ he is produced before this court,
and here sues for the restitution of his liberty.

THE questions, arising on this case, do not merely concern the unfortunate person, who is the subject of it, and such as are or may be under like unhappy circumstances. They are highly interesting to the whole community, and cannot be decided, without having the most general and important consequences; without extensive influence on private happiness and publick security. The right, claimed by Mr. Steuart to the detention of the negro, is founded on the condition of slavery, in which he was before his master brought him into England; and if that right is here recognized, domestick slavery, with it's horrid train of evils, may be lawfully imported into this country, at the discretion of every individual foreign and native. It will come not only from our own colonies, and those of other European nations; but from Poland, Russia, Spain, and Turkey, from the coast of Barbary, from the Western and Eastern coasts of Africa, from every part of the world, where it still continues to torment and dishonour the human species. It will be transmitted to us in all it's various forms, in all the gradations of inventive cruelty; and by an universal reception of slavery, this country, so famous for publick liberty, will become the chief seat of private tyranny.

In speaking on this case, I shall arrange my observations under two heads. FIRST I shall consider the right,

Points
which arise
in the case.

right, which Mr. Steuart claims in the person of the negro. **SECONDLY** I shall examine Mr. Steuart's authority to enforce that right, if he has any, by imprisonment of the negro and transporting him out of this kingdom. The court's opinion in favour of the negro, on either of these points, will entitle him to a discharge from the custody of Mr. Steuart.

(1st) Point
on the right
claimed in
the negro's
person.

Slavery the
foundation
of the claim
to the negro.

(1st.) **T**H E first point, concerning Mr. Steuart's right in the person of the negro, is the great one, and that which, depending on a variety of considerations, requires the peculiar attention of the court. Whatever Mr. Steuart's right may be, it springs out of the condition of slavery, in which the negro was before his arrival in England, and wholly depends on the continuance of that relation ; the power of imprisoning at pleasure here, and of transporting into a foreign country for sale as a slave, certainly not being exercifeable over an ordinary servant. Accordingly the return fairly admits slavery to be the sole foundation of Mr. Steuart's claim ; and this brings the question, as to the present lawfulness of slavery in England, directly before the court. It would have been more artful to have asserted Mr. Steuart's claim in terms less explicit, and to have stated the slavery of the negro before his coming into England, merely as a ground for claiming him here, in the relation of a servant bound to follow wherever his master should require his service. The case represented in this disguised way, tho' in substance the same, would have been less alarming in it's

first

first appearance, and might have afforded a better chance of evading the true question between the parties. But this artifice, however convenient Mr. Steuart's counsel may find it in argument, has not been adopted in the return; the case being there stated as it really is, without any suppression of facts to conceal the great extent of Mr. Steuart's claim, or any colouring of language to hide the odious features of slavery in the feigned relation of an ordinary servant.

BEFORE I enter upon the enquiry into the present lawfulness of slavery in England, I think it necessary to make some general observations on slavery. I mean however always to keep in view slavery, not as it is in the relation of a subject to an absolute prince, but only as it is in the relation of the lowest species of servant to his master, in any state whether free or otherwise in its form of government. Great confusion has ensued from discoursing on slavery, without due attention to the difference, between the despotism of a sovereign over a whole people and that of one subject over another. The former is foreign to the present case; and therefore when I am describing slavery, or observing upon it, I desire to be understood as confining myself to the latter; though from the connection between the two subjects, some of my observations may perhaps be applicable to both,

General ob-
servations on
domestick
slavery.

SLAVERY has been attended in different countries with circumstances so various, as to render it difficult

Difficulty of
defining fla-
very.

to give a general description of it. The Roman lawyer (*a*) calls slavery, *a constitution of the law of nations, by which one is made subject to another contrary to nature.* But this, as has been often observed by the commentators, is mistaking the law by which slavery is constituted for slavery itself, the cause for the effect; though it must be confessed, that the latter part of the definition obscurely hints at the nature of slavery. Grotius (*b*) describes slavery to be, *an obligation to serve another for life, in consideration of being supplied with the bare necessaries of life.* Dr. Rutherford (*c*) rejects this definition, as implying a right to direct only the labors of the slave and not his other actions. He therefore, after defining *despotism* to be *an alienable right to direct all the actions of another,* from thence concludes, that *perfect slavery is an obligation to be so directed.* This last definition may serve to convey a general idea of slavery; but like that by Grotius, and many other definitions which I have seen, if understood strictly, will scarce suit any species of slavery, to which it is applied. Besides, it omits one of slavery's severest and most usual incidents; the quality, by which it involves all the issue in the misfortune of the parent. In truth, as I have already hinted, the variety of forms, in which slavery appears, makes it almost impossible to convey a just notion of it in the way of de-

(*a*) Dig. lib. 1. tit. . lex 4. f. 1. *Servitus est constitutio juris gentium, quâ quis dominio alieno contra naturam subjicitur.*

(*b*) Jur. Bell. lib. 2. c. 5. f. 27.

(*c*) Inst. Nat. L. b. 1. c. 20. p. 474.

definition. There are however certain properties, which have accompanied slavery in most places; and by attending to these, we may always distinguish it, from the mild species of domestic service so common and well known in our own country. I shall shortly enumerate the most remarkable of those properties; particularly, such as characterize the species of slavery adopted in our American colonies, being that now under the consideration of this court. This I do, in order that a just conception may be formed, of the propriety with which I shall impute to slavery the most pernicious effects. Without such a previous explanation, the most solid objections to the permission of slavery will have the appearance of unmeaning, though specious, declamation.

SLAVERY always imports an obligation of perpetual service; an obligation, which only the consent of the master can dissolve.—It generally gives to the master, an arbitrary power of administering every sort of correction, however inhuman, not immediately affecting the life or limb of the slave: sometimes even these are left exposed to the arbitrary will of the master, or they are protected by fines, and other slight punishments, too insconsiderable to restrain the master's inhumanity.—It creates an incapacity of acquiring, except for the master's benefit.—It allows the master to alienate the person of the slave, in the same manner as other property.—Lastly, it descends from parent to child, with all its severe appendages.—On the most accurate

Properties
usually in-
cident to
slavery.

comparison,

comparison, there will be found nothing exaggerated in this representation of slavery. The description agrees with almost every kind of slavery, formerly or now existing; except only that remnant of the ancient slavery, which still lingers in some parts of Europe, but qualified and moderated in favor of the slave by the humane provision of modern times.

**Bad effects
of slavery.**

FROM this view of the condition of slavery, it will be easy to derive its destructive consequences.—It corrupts the morals of the master, by freeing him from those restraints with respect to his slave, so necessary for the controul of the human passions, so beneficial in promoting the practice and confirming the habit of virtue.—It is dangerous to the master, because his oppression excites implacable resentment and hatred in the slave, and the extreme misery of his condition continually prompts him to risque the gratification of them, and his situation daily furnishes the opportunity.—To the slave it communicates all the afflictions of life, without leaving for him scarce any of its pleasures; and it depresses the excellence of his nature, by denying the ordinary means and motives of improvement.—It is dangerous to the state, by its corruption of those citizens on whom its prosperity depends; and by admitting within it a multitude of persons, who, being excluded from the common benefits of the constitution, are interested in scheming its destruction.—Hence it is, that slavery, in whatever light we view it, may be deemed a most pernicious institution: immediately

diately so, to the unhappy person who suffers under it; finally so, to the master who triumphs in it, and to the state which allows it.

HOWEVER, I must confess, that notwithstanding the force of the reasons against the allowance of domestic slavery, there are civilians of great credit, who insist upon its utility; founding themselves chiefly, on the supposed increase of robbers and beggars in consequence of its disuse. This opinion is favoured by Puffendorf (*d*) and Ulricus Huberus (*e*). In the dissertation on slavery prefixed to Potgiesserus on the German law *de statu servorum*, the opinion is examined minutely and defended. To this opinion I oppose those ill consequences, which I have already represented as almost necessarily flowing from the permission of domestic slavery; the numerous testimonies against it, which are to be found in antient and modern history; and the example of those European nations, which have suppressed the use of it, after the experience of many centuries and in the more improved state of society. In justice also to the writers just mentioned I must add, that though they contend for the advantages of domestic slavery, they do not seem to approve of it, in the form and extent in which it has generally been received, but under limitations, which would certainly render it far more tolerable. Huberus in his *Eunomia Romana* (*f*) has a remarkable passage, in which, after recommend-

Opinion of
some mo-
dern writers
in favour of
the utility
of slavery,
but under
many re-
strictions.

(*d*) Law of Nature and Nations, b. 6. c. 3. f. 10.

(*e*) Prælect. Jur. Civ. pag. 16.

(*f*) See pag. 48.

ing a mild slavery, he cautiously distinguishes it from that cruel species, the subject of commerce between Africa and America. His words are, *Loquor de servitute, qualis apud civiliores populos in usu fuit; nec enim exempla barbarorum, vel quæ nunc ab Africa in Americam sunt hominum commercia, velim mibi quisquam objiciat.*

Origin of
slavery, and
it's general
lawfulness
considered.

THE great origin of slavery is captivity in war, though sometimes it has commenced by contract. It has been a question much agitated, whether either of these foundations of slavery is consistent with natural justice. It would be engaging in too large a field of enquiry, to attempt reasoning on the *general lawfulness* of slavery. I trust too, that the liberty, for which I am contending, doth not require such a disquisition; and am impatient to reach that part of my argument, in which I hope to prove slavery reprobated by the law of England as an *inconvenient* thing. Here therefore I shall only refer to some of the most eminent writers, who have examined, how far slavery founded on captivity or contract is conformable to the law of nature, and shall just hint at the reasons, which influence their several opinions. The antient writers suppose the right of killing an enemy vanquished in a just war; and thence infer the right of enslaving him. In this opinion, founded, as I presume, on the idea of punishing the enemy for his injustice, they are followed by Albericus Gentilis (g), Grotius (h),

(g) *De Jur. Gent. cap. de servitute.*

(h) *De Jur. Bell. l. 3. c. 7. s. 5.*

Puffendorf (*i*), Bynkershoek (*j*), and many others. But in the Spirit of Laws (*k*) the right of killing is denied, except in case of absolute necessity and for self-preservation. However, where a country is conquered, the author seems to admit the conqueror's right of enslaving for a short time, that is, till the conquest is effectually secured. Dr. Rutherford (*l*), not satisfied with the right of killing a vanquished enemy, infers the right of enslaving him, from the conqueror's right to a reparation in damages for the expences of the war. I do not know, that this doctrine has been examined; but I must observe, that it seems only to warrant a temporary slavery, till reparation is obtained from the property or personal labor of the people conquered. The lawfulness of slavery by contract is assented to by Grotius and Puffendorf (*m*), who found themselves on the maintenance of the slave, which is the consideration moving from the master. But a very great writer of our own country, who is now living, controverts (*n*) the sufficiency of such a consideration. Mr. Locke (*o*) has framed another kind of argument against slavery by contract; and the sub-

(*i*) Law of Nature and Nations, b. 6. c. 3. f. 6.

(*j*) Quæst. Jur. Publ. l. 1. t. 3.

(*k*) B. 15. c. 2.

(*l*) See his Inst. Nat. Law, vol. 2. p. 573. and vol. 1. p. 481.

(*m*) See Grot. Jur. Bell. l. 2. c. 5. f. 1, 2. & Puff. Law of Nature and Nations, b. 6. c. 3. f. 4.

(*n*) See Blackft. Comment. 1st. ed. vol. 1. p. 412.

(*o*) See Locke on Governm. 8vo edit. b. 2. c. 4. p. 213.

stance of it is, that a right of preserving life is unalienable; that freedom from arbitrary power is essential to the exercise of that right; and therefore, that no man can by compact enslave himself. Dr. Rutherford (*p*) endeavours to answer Mr. Locke's objection, by infisting on various limitations to the despotism of the master; particularly, that he has no right to dispose of the slave's life at pleasure. But the misfortune of this reasoning is, that though the contract cannot justly convey an arbitrary power over the slave's life, yet it generally leaves him without a security against the exercise of that or any other power. I shall say nothing of slavery by birth; except that the slavery of the child *must* be unlawful, if that of the parent cannot be justified; and that when slavery is extended to the issue, as it usually is, it *may* be unlawful as to them, even though it is not so as to their parents. In respect to slavery used for the punishment of crimes against civil society, it is founded on the same necessity, as the right of inflicting other punishments; never extends to the offender's issue; and seldom is permitted to be domestic, the objects of it being generally employed in public works, as the galley-slaves are in France. Consequently this kind of slavery is not liable to the principal objections, which occur against slavery in general (*q*). Upon

(*p*) See his Inst. Nat. Law, vol. 1. p. 480.

(*q*) Some writers there are, who deduce the lawfulness of domestic slavery from the practice of it amongst the Jews, and from some

on the whole of this controversy concerning slavery, I think myself warranted in saying, that the justice and lawfulness of every species of it, *as it is generally constituted*, except the limited one founded on the commission of crimes against civil society, is at least doubtful; that if in any case lawful, such circumstances are necessary to make it so, as seldom concur, and therefore render a just commencement of it barely possible; and that the oppressive manner in which it has generally commenced, the cruel means necessary to enforce it's continuance, and the mischiefs ensuing from the permission of it, furnish very strong presumptions against it's justice, and at all events evince the humanity and policy of those states, in which the use of it is no longer tolerated.

BUT however reasonable it may be to doubt the justice of domestic slavery, however convinced we may be of it's ill effects, it must be confessed, that the practice is ancient, and has been almost universal. Its beginning may be dated from the remotest period, in which there are any traces of the history of mankind. It commenced in the barbarous state of society, and was retained, even when men were far advanced in civilization. The nations of antiquity most famous for

Universality
of domestic
slavery
amongst the
ancients.

some passages in the Old Testament which are thought to countenance it. See Vinn. in Institut. Heinece. ed. l. s. t. 3. p. 31. There are others who attempt to justify slavery by the New Testament, because it contains no direct precepts against it. See Tayl. Elem. Civ. L. 434.—I shall not attempt to examine either of these opinions.

countenancing the system of domestic slavery were the Jews, the Greeks, the Romans, and the antient Germans (*r*) ; amongst all of whom it prevailed, but in various degrees of severity. By the antient Germans it was continued in the countries they over-run ; and so was transmitted to the various kingdoms and states, which arose in Europe out of the ruins of the Roman empire. At length however it fell into decline in most parts of Europe ; and amongst the various causes, which contributed to this alteration, none were probably more effectual, than experience of it's advantages, the difficulty of continuing it, and a persuasion, that the cruelty and oppression, almost necessarily incident to it, were irreconcileable with the pure morality of the Christian dispensation. The history of it's decline in Europe has been traced by many eminent writers, particularly Bodin (*s*), Albericus Gentilis (*t*), Potgiefserus (*u*), Dr. Robertson (*w*), and Mr. Millar (*x*). It is sufficient here to say, that this great change began in

(*r*) It appears by Cæsar and Tacitus, that the ancient Germans had a kind of slaves before they emigrated from their own country. See Cæs. de bell. Gall. lib. 6. cap. 13. & Tac. de mor. German. cap. 24. & 25. et Potgiess. de statu servorum. ap. Germ. lib. 1. cap. 1.

(*s*) See his book De Republicâ, cap. 5. de imperio servili.

(*t*) Jur. Gent. cap. de servitute.

(*u*) Jur. Germ. de statu servorum.

(*w*) Life of the Emperor Charles the 5th, vol. 1.

(*x*) Observations on the distinction of ranks in civil society.

See also Tayl. Elem. Civ. L. 431. to 439.

Spain, according to Bodin, about the end of the 8th century, and was become general before the middle of the 14th century. Bartolus, the most famed commentator on the Civil law in that period, represents slavery as in disuse; and the succeeding commentators hold much the same language. However, they must be understood with many restrictions and exceptions; and not to mean, that slavery was completely and universally abolished in Europe. Some modern Civilians, not sufficiently attending to this circumstance, rather too hastily reprehend their predecessors for representing slavery as disused in Europe. The truth is, that the ancient species of slavery by frequent emancipations became greatly diminished in extent; the remnant of it was considerably abated in severity; the disuse of the practice of enslaving captives taken in the wars between Christian powers assisted in preventing the future increase of domestic slavery; and in some countries of Europe, particularly England, a still more effectual method, which I shall explain hereafter, was thought of to perfect the suppression of it. Such was the expiring state of domestic slavery in Europe at the commencement of the 16th century, when the discovery of America and of the Western and Eastern coasts of Africa gave occasion to the introduction of a new species of slavery. It took its rise from the Portuguese, who, in order to supply the Spaniards with persons able to sustain the fatigue of cultivating their new possessions in America, particularly the Islands, opened a trade between Africa and America for the sale of negro slaves. This disgraceful commerce

Revival of
domestic slav-
ery in
America.

commerce in the human species is said to have begun in the year 1508, when the first importation of negro slaves was made into Hispaniola from the Portuguese settlements on the Western coast of Africa (y). In 1540 the Emperor Charles the 5th endeavored to stop the progress of the negro slavery, by orders that all slaves in the American isles should be made free; and they were accordingly manumitted by Lagasca the governor of the country, on condition of continuing to labor for their masters. But this attempt proved unsuccessful, and on Lagasca's return to Spain domestic slavery revived and flourished as before (z). The expedient of having slaves for labor in America was not long peculiar to the Spaniards; being afterwards adopted by the other Europeans, as they acquired possessions there. In consequence of this general practice, negroes are become a very considerable article in the commerce between Africa and America; and domestic slavery has taken so deep a root in most of our own American colonies, as well as in those of other nations, that there is little probability of ever seeing it generally suppressed.

The attempt
to introduce
the slavery of
negroes into
England
examined.

HERE I conclude my observations on domestick slavery in general. I have exhibited a view of it's nature, of it's bad tendency, of it's origin, of the arguments for and against it's justice, of it's decline in Europe, and the introduction of a new slavery by the Eu-

(y) Ander. Hist. Comm. v. 1. p. 336.

(z) See Bodin de republic. lib. 1. c. 5.

ropean nations into their American colonies. I shall now examine the attempt to obtrude this new slavery into England. And here it will be material to observe, that if on the declension of slavery in this and other countries of Europe where it is discountenanced, no means had been devised to obstruct the admission of a *new* slavery, it would have been vain and fruitless to have attempted superseding the *antient* species. But I hope to prove, that our ancestors at least were not so short-sighted; and that long and uninterrupted usage has established rules, as effectual to prevent the revival of slavery, as their humanity was successful in once suppressing it. I shall endeavour to shew, that the law of England never recognized any species of domestic slavery, except the *antient* one of *villenage* now expired, and has sufficiently provided against the introduction of a *new* slavery under the name of *villenage* (*a*) or any other denomination whatever. This proposition I hope to demonstrate from the following considerations.

I. I apprehend, that this will appear to be the law of England from the manner of making title to a villein.

THE only slavery our law-books take the least notice of is that of a villein; by whom was meant, not the mere

(*a*) Villenage is used to express sometimes the *tenure* of lands held by villein-services, and sometimes the *personal bondage* of the villein; but throughout this argument it is applied in the latter sense only.

Arguments
to prove,
that the law
of England
will not ad-
mit a new
slavery.

1. Argu-
ment from
the manner
of making
title to a
villein.

tenant

tenant by villein services, who might be free in his person, but the villein in blood and tenure: and as the English law has no provisions to regulate any other slavery, therefore no slavery can be lawful in England, except such as will consistently fall under the denomination of villenage.

The condition of a villein.

THE condition of a villein had most of the incidents, I have before described, in giving the idea of slavery in general. His service was uncertain and indeterminate, such as his lord thought fit to require; or as some of our ancient writers (*b*) express it, *he knew not in the evening what he was to do in the morning, he was bound to do whatever he was commanded.* He was liable to beating, imprisonment, and every other chastisement his lord could devise, except killing and maiming (*c*). He was incapable of acquiring property for his own benefit, the rule being *quicquid acquiritur servo acquiritur domino* (*d*). He was himself the subject of pro-

(*b*) See the extracts from them in Co. Litt. 116. b.

(*c*) See Termes de la Ley, ed. of 1567. voc Villenage—Old Tenures, cap. Villenage—Fitzh. Abr. Coron. 17.—2. Ro. Abr. 1.—2. Inst. 45.—& Co. Litt. 126. & 127. ,

(*d*) Co. Litt. 117. a.—The words, in pleading seizin of villein-service, are very expressive of the lord's power over the villein's property. In 1. E. 2. 4. it is pleaded that the lord was seized of the villein and his ancestors *come affaire rebat de char & de fank & de fille marier & de eux tailler haut & bas, &c.* The form in 5. E. 2. 15. is, *come de nos vilynes en fesant de lui notre provost en pnant de lui rebat de char & de faunk & redempson pur fill & fitz marier de lui & de ces aunc & a tailler haut & bas a notre volente.* In the first of

perty; as such saleable and transmissible. If he was a villein regardant, he passed with the manor or land to which he was annexed, but might be severed at the pleasure of his lord (*e*). If he was a villein in gross, he was an hereditament or a chattel real according to his lord's interest; being descendible to the heir where the lord was absolute owner, and transmissible to the executor where the lord had only a term of years in him (*f*). Lastly, the slavery extended to the issue, if both parents were villeins, or if the father only was a villein; our law deriving the condition of the child from that of the father, contrary to the Roman law, in which the rule was *partus sequitur ventrem* (*g*).

In the above forms there is evidently a misprint; and the reading should be *a faire rebat* instead of *affaire rebat*. As to the word *provoſt* in the second form, it seems to signify *plunder*, and perhaps the print should be *proie* or *proye* instead of *provoſt*. I was led to this conjecture by the following proverb in Cotgrave's French Dictionary, *qui a le vilain il a la proye*. See Cotgr. ed. of 1673. voc. *proye*. However, in the Latin Entries the word *provoſt* is translated *propositum*, which in a barbarous sense of the word may be construed to signify *will* or *pleasure*, and will make the passage intelligible. In some Entries *provoſt* is translated *præpositus*; but this word cannot be understood in any sense that will make this use of it intelligible.

The forms of pleading seizin of villein-services in the Latin Entries are very similar to those I have extracted from the year books. See Raft. Entr. 401. a.

(*e*) Litt. sect. 181.

(*f*) Bro. Abr. Villenage, 60.—Co. Litt. 117.

(*g*) Co. Litt. 123. Antiently our law seems to have been very uncertain in this respect. See Glanv. lib. 5. c. 6. Mirr. c. 2. l. 38.

The origin
of villeins.

THE origin of villenage is *principally* (*b*) to be derived from the wars between our British Saxon Danish and Norman ancestors, whilst they were contending for the possession of this country. Judge Fitzherbert, in his reading on the 4th of Edw. I. stat. 1. intitled *Extenta manerii*, supposes villenage to have commenced at the Conquest, by the distribution then made of the forfeited lands and of the vanquished inhabitants resident upon them (*i*). But there were many bondmen in England before the Conquest, as appears by the Anglo-Saxon laws regulating them; and therefore it would be nearer the truth to attribute the origin of villeins, as well to the preceding wars and revolutions in this country, as to the effects of the Conquest (*k*).

Decline of
villenage.

AFTER the Conquest many things happily concurred, first to check the progress of domestic slavery in England, and finally to suppress it. The cruel cus-

Britt. c. 31. But the writers in the reign of Henry the 6th agree, that our law was as here represented; and from the plea of bastardy, which was held to be a peremptory answer to the allegation of villenage so early as the reign of Edward the 3d. I conjecture, that the law was settled in the time of his father. See Fortesc. laud. leg. Angl. c. 42. Litt. sect. 187.—43. E. 3. 4. & Bro. Abr. Villenage, 7.

(*b*) I do not say *wholly*, because probably there were some slaves in England before the first arrival of the Saxons; and also they and the Danes might bring some few from their own country.

(*i*) See the extract from Fitzherbert's reading in Barrington. Observ. on Ant. Stat. 2d edit. p. 237.

(*k*) See Spelm. Gloss. voc. *Lazzi* & *Servus*. Somm. on Gavelk. 65. and the index to Wilk. Leg. Saxon. tit. *Servus*.

tom of enslaving captives in war being abolished, from that time the accession of a new race of villeins was prevented, and the humanity policy and necessity of the times were continually wearing out the ancient race. Sometimes, no doubt, manumissions were freely granted; but they probably were much oftener extorted during the rage of the civil wars, so frequent before the reign of Henry the 7th about the forms of the constitution or the succession to the crown. Another cause, which greatly contributed to the extinction of villenage, was the discouragement of it by the courts of justice. They always presumed in favor of liberty, throwing the *onus probandi* upon the lord, as well in the writ of *homine replegiando*, where the villein was plaintiff, as in the *nativo babendo*, where he was defendant (1). Non-

(1) See Lib. Intrat. 176. a. 177. b. & Bro. Abr. Villenage, 66. It seems however, that if after a *nativo babendo* brought by the lord, the villein, instead of waiting for the lord's proceeding upon it, sued out a *libertate probanda* to remove the question of villenage for trial before the justices in eyre, on the return of it he was to produce some proof of his free condition; and that if he failed, he and his pledges were amerced. But this failure did not entitle the lord to any benefit from his *nativo babendo*, and therefore, if he proceeded in it, and could not prove the villenage, the judgment was for the villein; or if the lord did not proceed, a nonsuit, which was equally fatal to the lord's claim, was the necessary consequence. See 47. H. 3. It. Dev. Fitz. Abr. Villenage, 39. In truth, the requisition of proof from the villein on the *libertate probanda*, and the amercement for want of it, seem to have been mere form; for as Fitzherbert says in explaining the effect of the *libertate probanda*, "the record shall be sent before the justices in eyre, and the lord shall declare thereupon, and the villein shall make his defence and

suit of the lord after appearance in a *nativo babendo*, which was the writ for asserting the title of slavery, was

" plead thereunto, and the villein shall not declare upon the writ
 " *de libertate probanda*, nor shall any thing be done thereupon; for
 " that writ is but a *superfedeas* to surcease for the time, and to adjourn
 " the record and the writ of *nativo babendo* before the justices in
 " eyre." Fitzh. Nat. Br. 77. D. Upon the whole therefore it
 may I think be safely asserted, that in all cases of villenage the
onus probandi lay upon the lord.

The several remedies against and for one claimed as a villein are now so little understood, that perhaps a short account of them may be acceptable; more particularly as, by a right conception of them, it will be more easy to determine on the force of the argument drawn against the revival of slavery from the rules concerning villenage.

The lord's remedy for a fugitive villein was, either by seizure, or by suing out a writ of *nativo babendo*, or *neifly*, as it is sometimes called.

1. If the lord seized, the villein's most effectual mode of recovering liberty was by the writ of *bomine replegiando*; which had great advantage over the writ of *babeas corpus*. In the *babeas corpus* the truth of the return cannot be contested by pleading against the truth of it, and consequently on a *babeas corpus* the question of liberty cannot go to a jury for trial; though indeed the party making a false return is liable to an action for damages, and punishable by the court for a contempt; and the court will hear affidavits against the truth of the return, and if not satisfied with it restore the party to his liberty. Therefore, if to a *babeas corpus* villenage was returned as the cause of detainer, the person for whom the writ was sued at the utmost could only have obtained his liberty for the time, and could not have had a regular and final trial of the question. But in the *bomine replegiando* it was otherwise; for if villenage was returned, an *alias* issued directing the sheriff to replevy the party on his giving security to answer the claim of villenage afterwards, and the plaintiff might declare for *false imprisonment* and lay da-

a bar to another *nativo babendo*, and a perpetual enfranchisement; but nonsuit of the villein after appearance in a *libertate probanda*, which was one of the writs for asserting the claim of liberty against the lord, was no bar to another writ of the like kind (*m*). If two plaintiffs joined in a *nativo babendo*, nonsuit of one was a nonsuit of both; but it was otherwise in a *libertate probanda* (*n*). The lord could not prosecute for more than *mages*, and on the defendant's pleading the villenage had the same opportunity of contesting it, as when impleaded by the lord in a *nativo babendo*. See Fitzh. N. Br. 66. F. & Lib. Intrat. 176. a. 177. b.

2. If the lord sued out a *nativo babendo*, and the villenage was denied, in which case the sheriff could not seize the villein, the lord was then to enter his plaint in the county court; and as the sheriff was not allowed to try the question of villenage in his court, the lord could not have any benefit from the writ, without removing the cause by the writ of *pone* into the King's bench or common pleas. [For the count pleading and judgment in the *nativo babendo* after the removal, see Raft. Entr. 436, 437.] It is to be observed, that the lord's right of seizure continued notwithstanding his having sued out a *nativo babendo*, unless the villein brought a *libertate probanda*. This writ, which did not lie except upon a *nativo babendo* previously sued out, was for removal of the lord's plaint in the *nativo babendo* for trial before the justices in eyre or those of the king's bench, and also for protecting the villein from seizure in the mean time. This latter effect seems to have been the chief reason for suing out the *libertate probanda*; and therefore after the 25th of Edw. 3. stat. 5. c. 18. which altered the common law, and gives a power of seizure to the lord, notwithstanding the pendency of a *libertate probanda*, that writ probably fell much into disuse, though subsequent cases, in which it was brought, are to be found in the year books. See Fitzh. Nat. 77. to 79. & 11. Hen. 4. 49.

(*m*) Co. Litt. 139.

(*n*) Co. Litt. 139.

two villeins in one *nativus habendo*; but any number of villeins of the same blood might join in one *libertate probanda* (o). Manumissions were inferred from the slightest circumstances of mistake or negligence in the lord, from every act or omission which legal refinement could strain into an acknowledgement of the villein's liberty. If the lord vested the ownership of lands in the villein, received homage from him, or gave a bond to him, he was enfranchised. Subjecting the villein to be on a jury, to enter into religion and be professed, or to stay a year and a day in ancient demesne without claim, were enfranchisements. Bringing ordinary actions against him, joining with him in actions, answering to his actions without protestation of villenage, imparling in them or assenting to his imparlance, or suffering him to be vouched without counterpleading the voucher, were also enfranchisements by implication of law (p). Most of the constructive manumissions I have mentioned were the received law, even in the reign of the first Edward (q). I have been the more particular in enumerating these instances of extraordinary favor to liberty; because the anxiety of our ancestors to emancipate the *ancient* villeins, so well accounts for the establishment of any rules of law calculated to obstruct the introduction of a *new stock*. It was natural, that the same opinions, which influenced to discountenance

(o) Fitzh. Nat. Br. 73. C. D.

(p) See Litt. sect. 202 to 209. & 2. Ro. Abr. 735, 736, & 737.

(q) See Britt. cap. 31. & Mirr. cap. 2. sect. 38.

the former, should lead to the prevention of the latter.

I SHALL not attempt to follow villenage in the several stages of it's decline ; it being sufficient here to mention the time of it's extinction, which, as all agree, happened about the latter end of Elizabeth's reign or soon after the accession of James (r). One of the last instances, in which villenage was insisted upon, was Crouch's case reported in Dyer and other books (s). An entry having been made by one Butler on some lands purchased by Crouch, the question was, whether he was Butler's villein regardant ; and on two special verdicts, the one in ejectment Mich. 9th and 10th Eliz. and the other in assize Easter 11th Eliz. the claim of villenage was disallowed, one of the reasons given for the judgment in both being the want of seizin of the villein's person within 60 (t) years, which is the time limited by the 32d of Hen. 8. chap. 2. in all cases of hereditaments claimed by prescription (u). This is generally said to have been the last case of villenage ; but there are four subsequent

When vil-
lenage ex-
pired.

(r) See Sir Thomas Smith's Commonwealth, b. 2. c. 10. and Barrington. Observ. on Ant. Stat. 2d Ed. p. 232.

(s) See Dy. 266. pl. 11. & 283. pl. 32.

(t) Accord. Bro. Read. on the stat. of limitat. 32. Hen. 8. page 17.

(u) Before this statute of Hen. the 8th, the time of limitation seems to have been the coronation of Hen. 3. as appears by the form of the *nativo babendo* ; though in other writs of right the limitation by 31. E. 1. c. 39. was from the commencement of the reign of Rich. the 1st.

cases in print. One was in Hillary 18th of Elizabeth (*w*) ; another was a judgment in Easter 1st of James (*x*) ; the third, which was never determined, happened in Trinity 8th of James (*y*) ; and the fourth was so late as Hillary 15th of James (*z*). From the 15th of James the first, being more than 150 years ago, the claim of villenage has not been heard of in our courts of justice ; and nothing can be more notorious, than that the race of persons, who were once the objects of it, was about that time completely worn out by the continual and united operation of deaths and manumissions.

But though villenage itself is obsolete, yet fortunately those rules, by which the claim of it was regulated, are not yet buried in oblivion. These the industry of our ancestors has transmitted ; nor let us their posterity despise the reverend legacy. By a strange progress of human affairs, *the memory of slavery expired now furnishes one of the chief obstacles to the introduction of slavery attempted to be revived* ; and the venerable reliques of the learning relative to villenage, so long consigned to gratify the investigating curiosity of the antiquary, or used as a splendid appendage to the ornaments of the scholar, must now be drawn forth from

(*w*) See Co. Entr. 406. b.

(*x*) Yelv. 2.

(*y*) This case is only to be found in Hughes' Abridgment, tit. Villenage, pl. 23.

(*z*) Noy 27.

their faithful repositories for a more noble purpose ; to inform and guide the sober judgment of this court, and as I trust to preserve this country from the miseries of domestic slavery.

LITTLETON (*a*) says, *every villein is either a villein by title of prescription, to wit that he and his ancestors have been villeins time out of memory, or he is a villein by his own confession in a court of record.* And in another place (*b*) his description of a villein regardant, and of a villein in gross, shews that title cannot be made to either without prescription or confession. *Time whereof no memory runs to the contrary,* is an inseparable incident to every prescription (*c*) ; and therefore, according to Littleton's account of villenage, the lord must *prove* the slavery *antient and immemorial* ; or the villein must solemnly *confess* it to be so in a court of justice. A still earlier writer lays down the rule in terms equally strong. *No one, says Britton (*d*), can be a villein except of antient nativity, or by acknowledgment.* All the proceedings in cases of villenage when contested, conform to this idea of *remote antiquity* in the slavery, and are quite irreconcileable with one of *modern commencement*.

Manner of
making title
to a villein
explained.

(*a*) Sect. 175.

(*b*) Sect. 181, 182, & 185.

(*c*) Litt. sect. 170.

(*d*) *Nul ne poit estre villeyn forsque de aunciene nativite ou par recognizance.* Britt. Wing. ed. cap. 31. p. 78.

1. THE villein in all such suits (*e*) between him and his lord was styled *natus* as well as *villanus*; our ancient (*f*) writers describe a female slave by no other name than that of *neif*; and the technical name of the only writ in the law for the recovery of a villein is equally remarkable, being always called the *nativo babendo*, or writ of *neiftry*. This peculiarity of denomination, which implies that villenage is a *slavery by birth*, might perhaps of itself be deemed too slight a foundation for any solid argument; but when combined with other circumstances more decisive, surely it is not without very considerable force.

2. IN pleading villenage where it had not been confessed on some former occasion, the lord always founded his title on *prescription*. Our year-books, and books of entries, are full of the forms used in pleading a title to villeins regardant. In the *homine replegiando*, and other actions where the plea of villenage was for the purpose of shewing the plaintiff's disability to sue, if the villein was regardant, the defendant alledged, that he was seized of such a manor, and that the plaintiff and his ancestors had been villeins belonging to the manor *time out of mind*, and that the defendant and his ancestors, and all those whose estate he had in the manor,

(*e*) See the form of the writs of *nativo babendo* and *libertate praebanda*, and also of the *alias homine replegiando*, where on the first writ the Sheriff returns the claim of villenage.

(*f*) Brit. cap. 31. & Litt. sect. 186.

had been seized of the plaintiff and *all his ancestors* as of villeins belonging to it (*g*). In the *natio[n]o habendo* the form of making title to a villein regardant was in substance the same (*b*). In fact, regardancy necessarily implies prescription, being where one and his ancestors have been annexed to a manor *time out of the memory of man* (*i*). As to villeins in gross, the cases relative to them are very few; and I am inclined to think, that there never was any great number of them in England. The author of the *Mirroir* (*k*), who wrote in the reign of Edward the 2d, only mentions villeins regardant; and Sir Thomas Smith, who was secretary of state in the reign of Edward the 6th, says, that in his time he never knew a villein in gross throughout the realm (*l*). However, after a long search I do find places in the year-books, where the form of alledging villenage in gross is expressed, not in full terms, but in a general way; and in all the cases I have yet seen, the villenage is alledged in the *ancestors* of the person against whom it was pleaded (*m*), and in one of them the words *time*

F 2

beyond

(*g*) See Raft. Entr. tit. *Homine Replegiando*, 373. & Lib. Intrat. 56.

(*b*) See the form in Lib. Intrat. 97. & Raft. Entr. 401.

(*i*) This is agreeable to what Littleton says in sect. 182.

(*k*) Mirr. c. 2. f. 38.

(*l*) Smith's Commonwealth, b. 2. c. 10.

(*m*) See 1. E. 2. 4.—5. E. 2. 15.—7. E. 2. 242. & 11. E. 2. 344. In 13. E. 4. 2. b. pl. 4. & 3. b. pl. 11. there is a case in which villenage in gross is pleaded, where one became a villein in gross by severance

beyond memory (*n*) are added. But if precedents had been wanting, the authority of Littleton, according to whom the title to villenage of each kind, unless it has been confessed, *must* be by prescription, would not have left the least room for supposing the pleading of a prescription less necessary on the claim of villeins in gross than of those regardant.

3. THE kind of evidence, which the law required to prove villenage, and allowed in disproof of it, is only applicable to a slavery in *blood* and *family*, one *uninterruptedly* transmitted through a long line of ancestors to the person against whom it was alledged. On the lord's part, it was necessary that he should prove the slavery against his villein by other villeins of the *same blood* (*o*), such as were descended from the same common

severance from the manor to which he had been regardant. This being the only case of the kind I have met with, I will state so much of it from the year-book as is necessary to shew the manner of pleading. In trespass the defendant pleads, that a manor, to which the plaintiff's father was a villein regardant, was given to an ancestor of the defendant in tail, and that the manor descended to Cecil and Catherine; and that on partition between them, the villein with some lands was allotted to Cecil, and the manor to Catherine; and then the defendant conveyed the villein from Cecil to himself as heir.

(*n*) 11. E. 2. 344.

(*o*) See Bro. Abr. Villenage, 66. Reg. Br. 87. a. Old Nat. Br. 43. b. Fitzh. Abr. Villenage, 38, 39. A *bastard* was not receivable to prove villenage, 13. E. 1. It. North. Fitzh. Abr. 36. & Britt. Wing. edit. 82. a.

male stock, and would acknowledge themselves villeins to the lord (p), or those from whom he derived his title ; and at least two witnesses (q) of this description were requisite for the purpose. Nay, so strict was the law in this respect, that in the *natio[n]o habendo* the defendant was not obliged to plead to the claim of villenage, unless the lord at the time of declaring on his title brought his witnesses with him into court, and they acknowledged themselves villeins, and swore to their consanguinity with the defendant (r) ; and if the plaintiff

(p) In Fitzherbert's *Natura Brevium*, 79. B. it is said, that the witnesses must acknowledge themselves villeins to the plaintiff in the *natio[n]o habendo* ; and there are many authorities which favour the opinion. See Glanv. lib. 5. c. 4. Britt. Wing. ed. 81. a. 19. Hen. 6. 32. b. Old Tenures, chap. Villenage ; and the form in which the confession of villenage by the plaintiff's witnesses is recorded in Raft. Entr. tit. *Natiuo habendo*, 401. a. However, it must be confessed, that in Fitzherbert the opinion is delivered with a *quære* ; and it is so irreconcileable with the lord's right of granting villeins, as it is stated by Littleton, sect. 181. that I will not insist upon it here.

(q) Fitzh. Nat. Br. 78. H. & Fitzh. Abr. Villenage, 36 & 37 — Also Britton says, *un male sauns plusurs nest mie receivable.* Britt. Wingate's ed. p. 82. It is remarkable that females, whether sole or married, were not receivable to prove villenage against men. *Saunk de un home ne puit ne doit estre trié par femmes.* Britt. Wing. ed. p. 82. The reason assigned is more antient than polite. It is said to be *pur lour frayte*, and also because a man *est plus digne person que une femme.* 13. E. 1. Fitzh. Abr. Villenage, 37.

(r) Fitzh. Nat. Br. 78. H. Fitz. Abr. Villenage, 32. Lib. Intrat. 97. Raft. Entr. 401. Reg. Br. 87,

failed in adducing such previous evidence, the judgment of the court was, that the defendant should be *free for ever*, and the plaintiff was amerced for his false claim (*s*). In other actions the production of *suit* or witnesses by the plaintiff, previously to the defendant's pleading, fell into disuse some time in the reign of Edward the third; and ever since, the entry of such production on the rolls of the court has been mere form, being always with an &c. and without naming the witnesses. But in the *nativus habendo* the actual production of the *suit*, and also the examination of them, unless the defendant released (*t*) it in court, continued to be indispensable even down to the time when villainage (*u*) expired. Such was the sort of testimony, by which only the lord could support the title of slavery; nor were the means of defence on the part of the villein less remarkable. If he could prove that the slavery was not in his *blood and family*, he intitled himself to liberty. The author of the *Mirroir* (*w*) expressly says, that *proof of a free stock* was an effectual defence against

(*s*) In Fitzh. Abr. Villenage, 38. there is an instance of such a judgment, merely for the plaintiff's failure in the production of his witnesses at the time of declaring on his title.

(*t*) See 19. H. 6. 32. b. a case in which the defendant releases the examination of the *suit*.

(*u*) The last entry in print of the proceedings in a *nativus habendo* contains the names of the *sesta* or *suit* produced, and their acknowledgment of villainage on oath. See the case of *Jerney* against *Finch*, Hill. 18. Eliz. C. B. Co. Entr. 406. b.

(*w*) Mirr. c. 2. s. 28.

the claim of villenage ; and even in the time of Henry the second the law of England was in this respect the same, as appears by the words of *Glanville*. In his chapter of the trial (*x*) of liberty, he says, that the person claiming it shall produce *plures de proximis et consanguineis de eodem stipite unde ipse exierat exeuntes* ; *per quorum libertates, si fuerint in curia recognitæ et probatae, liberabitur à jugo servitutis qui ad libertatem proclamatur*. But the special defences which the law permitted against villenage are still more observable ; and prove it beyond a contradiction to be, what the author of the *Mirroir* emphatically styles it (*y*), a *slavery of so great an antiquity that no free stock can be found by human remembrance*. Whenever the lord sued to recover a villein by a *nativo habendo*, or alledged villenage in other actions as a disability to sue, the person claimed as a villein might either plead *generally* that he was of free condition, and on the trial of this general issue avail himself of every kind of defence which the law permits against villenage ; or he might plead *specially* any single fact or thing, which if true was of itself a legal bar to the claim of villenage, and in that case the lord was compellable to answer the special matter. Of this special kind were the pleas of *bastardy* and *adventif*. The former was an allegation by the supposed villein that either himself or his father, grand-

(x) *Glanv. lib. 5. c. cap. 4.*

(y) *Eſt ſubjeſſion iſſuant de cy grand antiquite, que nul franke ceppe purra eſtre trove per humane remembrance. Mirr. c. 2. f. 28.*

father or other *male* ancestor, was born out of matrimony; and this plea, however remote the ancestor in whom the bastardy was alledged, was *peremptory* to the lord, that is, if true it destroyed the claim of villenage, and therefore the lord could only support his title by denying the fact of bastardy. This appears to have been the law from a great variety of the most antient authorities. The first of them is a determined case so early as the 13th of Edward the second (z), and in all the subsequent cases (a) the doctrine is received for law without once being drawn into question. In one of them (b) the reason why bastardy is a good plea in a bar against villenage is expressed in a very peculiar manner; for the words of the book are, *when one claims any man as his villein, it shall be intended always that he is his villein by reason of stock, and this is the reason that there shall be an answer to the special matter where he alledges bastardy; because if his ancestor was a bastard, he can never be a villein, unless by subsequent acknowledgement in a court of record.* The force of this reason will appear fully on recollection, that the law of England

(z) 13. E. 2. 408.

(a) Hill. 19. E. 2. Fitzh. Abr. Villenage, 32.—39. E. 3. 36.—43. E. 3. 4.—19. Hen. 6. 11. & 12,—19. Hen. 6. 17.—Old Tenures, cap. Villenage.—Co. Litt. 123. a. In the case 19. H. 6. 17. there is something on the trial of bastardy in cases of villenage, explaining when it shall be tried by the bishop's certificate and when by a jury. See on the same subject Fitzh. Abr. Villenage, 32. & Lib. Intrat. 35. a. which latter book contains the record of a case where the trial was by the bishop.

(b) 43. E. 3. 4.

always

always derives the condition of the issue from that of the father, and that the father of a bastard being in law uncertain (*c*), it was therefore impossible to prove a bastard a slave by *descent*. In respect to the plea of *adventif*, there is some little confusion in the explanation, our year-books give us, of the persons to whom the description of *adventif* is applicable; but the form of the plea will best shew the precise meaning of it. It alledged (*d*), that either the person himself who was claimed as a villein regardant to a manor, or one of his ancestors, was born in a county different from that in which the manor was, and *so was free*, which was held to be a necessary conclusion to the plea. This in general was the form of the plea, but sometimes it was more particular, as in the following case (*e*). In trespass, the defendant pleads that the plaintiff is his villein regardant to his manor of Dale; the plaintiff replies, that his great-grandfather was born in C, in the county of N, and from thence went into the county of S, and took lands held in bondage within the manor to which the plaintiff is supposed to be a villein regardant, and *so after time of memory his great-grandfather was adventif*. It is plain from this case, that the plea of *adventif* was calculated to destroy the claim to vil-

(*c*) Co. Litt. 123. a.

(*d*) 13. E. 1. It. North. Fitz. Abr. Villenage 36. 19. E. 2. Fitz. Abr. Villenage 32. 33. E. 3. Fitz. Abr. Visne 2.—39. E. 3. 36.—41. E. 3. Fitzh. Abr. Villenage 7.—43. E. 3. 31.—50. E. 3. Fitz. Abr. Villenage 24.—19. H. 6. 11.—19. H. 6. 17.

(*e*) 32. E. 3. Fitzh. Abr. Visne 1.

leverage regardant, by shewing that the connection of the supposed villein and his ancestors with the manor to which they were supposed to be regardant, had begun within time of memory ; and as holding lands by villein-services was antiently deemed a mark (*f*), though not a certain one, of *personal bondage*, I conjecture that this special matter was never pleaded, except to distinguish the *mere tenant by villein services* from the villein in *blood* as well as *tenure*. But whatever might be the cases proper for the plea of *adventif*, it is one other incontrovertible proof, in addition to the proofs already mentioned, that no slavery having had commencement *within time of memory* was lawful in England ; and that if one ancestor could be found whose blood was unpolluted with the stain of slavery, the title of villenage was no longer capable of being sustained.

How it is
that the
rules of law
concerning
villenage ex-
clude a new
slavery.

Such were the striking peculiarities in the manner of making title to a villein, and of contesting the question of liberty ; and it is scarce possible to attend to the enumeration of them, without anticipating me in the inferences I have to make.—The law of England only knows slavery by *birth* ; it requires *prescription* in making title to a slave ; it receives on the lord's part *no* testimony except such as proves the slavery to

(f) Fitzherbert says, if a man dwells on lands which have been held in villenage time out of mind, he shall be a villein, and it is a good prescription ; and against this prescription it is a good plea to say that his father or grandfather was adventif, &c. Fitz. Abr. Villenage 24.

have

have been *always in the blood and family*, on the *Villein's* part *every testimony* which proves the slavery to have been *once out of his blood and family*; it allows *nothing* to sustain the slavery except what shews its commencement *beyond* the time of memory, every thing to defeat the slavery which evinces its commencement *within* the time of memory. But in our American colonies and other countries slavery may be by *captivity or contract* as well as by *birth*; no *prescription* is *requisite*; nor is it necessary that slavery should be in the *blood and family*, and *immemorial*. Therefore the law of England is not applicable to the slavery of our American colonies, or of other countries.—If the law of England would permit the introduction of a slavery commencing out of England, the rules it prescribes for trying the title to a slave would be applicable to such a slavery; but they are not so; and from thence it is evident that the introduction of such a slavery is not permitted by the law of England.—The law of England then excludes *every slavery not commencing in England, every slavery though commencing there not being antient and immemorial*. Villenage is the only slavery which can possibly answer to such a description, and That has been long expired by the deaths and emancipations of all those who were once the objects of it. Consequently there is now no slavery which can be lawful in England, until the Legislature shall interpose its authority to make it so.

THIS is plain, unadorned, and direct reasoning ; it wants no aid from the colours of art, or the embellishments of language ; it is composed of necessary inferences from facts and rules of law, which do not admit of contradiction ; and I think, that it must be vain to attempt shaking a superstructure raised on such solid foundations.

As to the other arguments I have to adduce against the revival of domestic slavery, I do confess that they are less powerful, being merely presumptive. But then I must add, that they are strong and violent presumptions ; such as furnish more certain grounds of judicial decision, than are to be had in many of the cases which become the subjects of legal controversy. For

2d. Argument against a new slavery from the fact of there never having been any slavery but villeinage, and from the extinction of that slavery.

2dly, I infer that the law of England will not permit a *new* slavery, from the fact of there never yet having been any slavery but villeinage, and from the actual extinction of that *antient* slavery. If a *new* slavery could have lawfully commenced here, or lawfully have been introduced from a foreign country, is there the most remote probability, that in the course of so many centuries a *new* slavery should never have arisen ?

If a *new* race of slaves could have been introduced under the denomination of villeins, if a *new* slavery could have been from time to time engrafted on the *antient* stock, would the laws of villeinage have once become

become obsolete for want of objects, or would not a successive supply of slaves have continued their operation to the present times? But notwithstanding the vast extent of our commercial connections, the fact is confessedly otherwise. The *antient* slavery has once expired; neither natives nor foreigners have yet succeeded in the introduction of a *new* slavery; and from thence the strongest presumption arises, that the law of England doth not permit such an introduction.

3dly, I insist, that the unlawfulness of introducing a *new* slavery into England, from our American colonies or any other country, is deducible from the rules of the English law concerning contracts of service. The law of England will not permit any man to *enslave* himself by contract. The utmost, which our law allows, is a contract to serve for life; and some perhaps may even doubt the validity of such a contract, there being no determined cases directly affirming it's lawfulness. In the reign of Henry the fourth (g), there is a case of debt, brought by a servant against the master's executors, on a retainer to serve for term of life in peace and war for one hundred shillings a year; but it was held, that debt did not lie for want of a speciality; which, as was agreed, would not have been necessary in the case of a common labourer's salary, because, as the

3d. Argument against
a *new* slavery
from the
rules of law
against slaver-
y by con-
tract.

(g) 2, H. 4. 14,

case is explained by Brooke in abridging it, the latter is bound to serve by statute (*b*). This case is the only one I can find, in which a contract to serve for life is mentioned; and even in this case, there is no judicial decision on the force of it. Nor did the nature of the case require any opinion upon such a contract; the action not being to establish the contract against the servant, but to enforce payment against the master's executors for arrears of salary in respect of service actually performed; and therefore this case will scarce bear any inference in favour of a contract to serve for life. Certain also it is, that a service for life in England is not usual, except in the case of a military person; whose service, though in effect for life, is rather so by the operation of the yearly acts for regulating the army, and of the perpetual act for governing the navy, than in consequence of any express agreement. However, I do not mean absolutely to deny the lawfulness of agreeing to serve for life; nor will the inferences I shall draw from the rules of law concerning servitude by contract, be in the least affected by admitting such agreements to be lawful. The law of England may perhaps give effect to a contract of service for life; but that is the *ne plus ultra* of servitude by contract in England. It will not allow the servant to invest the master with an arbitrary power of correcting imprisoning (*i*) or alienating him; it will not permit

(*b*) Bro. Abr. Dett. 53.

(*i*) Lord Hobart says, *the body of a freeman cannot be made subject*

him to renounce the capacity of acquiring and enjoying property, or to transmit a contract of service to his issue (*k*). In other words, it will not permit the servant to incorporate into his contract the ingredients of slavery. And why is it that the law of England rejects a contract of slavery? The only reason to be assigned is, that the law of England, acknowledging only the *antient* slavery which is now expired, will not allow the introduction of a *new* species, even though founded on consent of the party. The same reason operates with double force against a *new* slavery founded on captivity in war, and introduced from another country. Will the law of England condemn a *new* slavery commencing by *consent* of the party, and at the same time approve of one founded on *force*, and most probably on *oppression* also? Will the law of England invalidate a *new* slavery commencing in this country, when the title to the slavery may be fairly examined; and at the same time give effect to a *new* slavery introduced from another country, when disproof of the slavery must generally be impossible?

to distress or imprisonment by contract, but only by judgment. Hob. 61.— I shall have occasion to make use of this authority again in a subsequent part of this argument.

(*k*) Mr. Molloy thinks, that servants may contract to serve for life; but then he adds, *but at this day there is no contract of the ancestor can oblige his posterity to an hereditary service; nor can such as accept those servants exercise the ancient right or dominion over them, no not so much as to use an extraordinary rigour, without subjecting themselves to the law.* Moll. de jur. marit. 1st. ed. b. 3. c. 1. l. 7. p. 388.

This

This would be rejecting and receiving a new slavery at the same moment; rejecting slavery the *least* odious, receiving slavery the *most* odious: and by such an inconsistency, the wisdom and justice of the English law would be compleatly dishonoured. Nor will this reasoning be weakened by observing that our law permitted villenage, which was a slavery confessed to originate from force and captivity in war; because that was a slavery coeval with the first formation of the English constitution, and consequently had a commencement here prior to the establishment of those rules which the common law furnishes against slavery by contract.

Examina-
tion of the
cases on the
subject of
slavery since
or just be-
fore the ex-
tinction of
villenage.

HAVING thus explained the three great arguments which I oppose to the introduction of domestick slavery from our American colonies, or any foreign country, it is now proper to enquire how far the subject is affected by the cases and judicial decisions since or just before the extinction of villenage.

THE first case on the subject is one mentioned in Mr. Rushworth's *Historical Collections* (1); and it is there said, that in the eleventh of Elizabeth, one Cartwright brought a slave from Russia, and would scourge him; for which he was questioned; and it was resolved, that England was too pure an air for a slave to breathe in. In order to judge what degree of credit is due to the

(1) Rushw. v. 2. p, 468.

representation of this case, it will be proper to state from whom Mr. Rushworth reports it. In 1637, there was a proceeding by information in the Star-Chamber against the famous John Lilburne, for printing and publishing a libel; and for his contempt in refusing to answer interrogatories, he was by order of the court imprisoned till he should answer, and also whipped, pilloried, and fined. His imprisonment continued till 1640; when the Long Parliament began. He was then released, and the House of Commons impeached the judges of the Star-chamber for their proceedings against Lilburne. In speaking to this impeachment, the managers of the Commons cited the case of the Russian slave. Therefore the truth of the case doth not depend upon John Lilburne's assertion, as the learned Observer on the Antient Statutes (*m*) seems to apprehend; but rests upon the credit due to the managers of the Commons. When this is considered, and that the year of the reign in which the case happened is mentioned, with the name of the person who brought the slave into England; that not above 72 or 73 years had intervened between the fact and the relation of it; and also that the case could not be supposed to have any influence on the fate of the impeachment against the judges; I see no great objection to a belief of the case. If the account of it is true, the plain inference from it is, that the slave was become free by his arrival in England. Any other construction renders the case unintelligible, because scourging,

(*m*) Barr. Observ. on Ant. Stat. 2d edit. p. 241.

or even correction of a severer kind, was allowed by the law of England to the lord in the punishment of his villein; and consequently, if our law had recognized the Russian slave, his master would have been justified in scourging him.

THE first case in our printed Reports is that of *Butts* against *Penny* (*n*), which is said to have been adjudged by the court of King's Bench in Trinity term 29th of Charles the second. It was an action of *trover* for 10 (*o*) negroes; and there was a special verdict, finding, that the negroes were infidels, subjects to an infidel prince, and usually bought and sold in *India* as merchandize by the custom amongst merchants, and that the plaintiff had bought them, and was in possession of them; and that the defendant took them out of his possession. The court held, that negroes *being usually bought and sold amongst merchants in India, and being infidels* (*p*), there

(*n*) 2. Lev. 201. & 3. Keb. 785. See Hill. 29. Cha. II. B. R. rot. 1116.

(*o*) According to Levinz, the action was for 100 negroes; but it is a mistake, the record only mentioning 10.

(*p*) According to this reasoning, it is lawful to have an infidel slave, but not a Christian one. This distinction, between persons of opposite persuasions in religion, is very antient. Amongst the Jews, the condition of the Hebrew slave had many advantages over that of a slave of foreign extraction. (See sect. 37. of the Dissertation on Slavery prefixed to Potgiesser. *Jus Germ. de Stat. Serv.*) Formerly too the Mahometans pretended, that their religion did not allow them to enslave such as should embrace it; but, as Bodin says, might

might be a property in them sufficient to maintain the action ; and it is said that judgment *nisi* was given for the plaintiff, but that on the prayer of the counsel for the defendant to be further heard in the case, time was given till the next term. In this way our Reporters state the case ; and if nothing further appeared, it might be cited as an authority, though a very feeble one, to shew that the master's property in his negro slaves continues after their arrival in England, and consequently that the negroes are not emancipated by being brought here. But having a suspicion of some defect in the state of the case, I desired an examination of the *roll* (*q.*) ; and according to the account of it given to me, though the declaration is for negroes *generally* in London, without any mention of *foreign* parts, yet from the special verdict it appears, that the action was really brought to recover the value of negroes, of which the plaintiff had been possessed, not in *England*, but in *India*. Therefore this case would prove nothing

the opinion was little attended to in practice. (See Bodin, de Republica, lib. 1. cap. 5. de imperio servili.) A like distinction was made in very early times amongst Christians ; and the author of the Mirroir in one place expresses himself, as if the distinction had been adopted by the law of England. (See the Mirr. c. 2. f. 28.) But our other antient writers do not take the least notice of such a distinction, nor do I find it once mentioned in the year-books ; which are therefore strong presumptive evidence against the reception of it in our courts of justice as *law*, however the opinion may have prevailed amongst divines and others in *speculation*. See Barr. Observ. Ant. Stat. 2d edit, p. 239.

(*q.*) The *roll* was examined for me by a friend.

in favour of slavery in *England*, even if it had received the court's judgment, which it never did, there being only an *ulterius consilium* on the roll.

THE next case of *trover* was between *Gelly* and *Cleve* in the Common Pleas, and was adjudged in Michaelmas term 5th of William and Mary. In the Report of this case (*r*), the court is said to have held, that trover will lie for a negro boy, because negroes are heathens ; and therefore a man may have property in them, and the court without averment will take notice that they are heathens. On examination of the *roll* (*s*), I find that the action was brought for various articles of merchandize as well as the negro ; and I suspect, that in this case, as well as the former one, of *Butts* and *Penny*, the action was for a negro in *America* ; but the declaration being laid generally, and there being no special verdict, it is now too late to ascertain the fact. I will therefore suppose the action to have been for a negro in *England*, and admit that it tends to shew the lawfulness of having negro slaves in *England*. But then if the case is to be understood in this sense, I say that the case appears to have been adjudged without solemn argument ; that there is no reasoning in the report of this case to impeach the principles of law, on which I have argued

(r) 1. L. Raym. 147.

(s) See Trin. 5 W. & M. C. B. Roll. n^o. 407.

against

against the revival of slavery in England ; that unless those principles can be controverted with success, it will be impossible to sustain the authority of such a case ; and further, that it stands contradicted by a subsequent case, in which the question of slavery came directly before the court.

THE only other reported case of *trover* is that of *Smith against Gould*, which was adjudged Mich. 4 Ann in the King's Bench. In *trover* (¹) for several things, and among the rest for a negro, *not guilty* was pleaded, and there was a verdict for the plaintiff with *several damages*, 30 l. being given for the negro ; and after argument on a motion in arrest of judgment, the court held, that *trover* did not lie for a negro. If in this case the action was for a negro in *England*, the judgment in it is a direct contradiction to the case of *Gelly and Cleve*. But I am inclined to think, that in this, as well as in the former cases of *trover*, the negroes for which the actions were brought, were *not* in *England* ; and that in all of them the question was *not* on the lawfulness of having negro slaves in *England*, but merely whether *trover* was the proper kind of action for recovering the value of a negro unlawfully detained from the owner in *America* and *India*. The things, for which *trover* in general lies, are those in which the owner has an absolute property, without limitation on the use of them ; whereas the master's power over the slave doth not

(¹) 2. *Salk.* 666.—See also, 1. *L. Raym.* 147.

extend to his life, and consequently the master's property in the slave is in some degree qualified and limited. I am willing to suppose, that the cases of *trover* were determined on this distinction, and therefore I will not insist upon any benefit from them in argument; though the last of them, if it will bear any material inference, is certainly an authority against slavery in England.

THE next case I shall state is a judgment by the King's Bench in Hillary 8th and 9th of William the 3d. *Trespass vi et armis* was brought by *Chamberlain* (u) against *Harvey*, for taking a negro of the value of 100l. and by the special verdict it appears, that the negro, for which the plaintiff sued, had been brought from Barbadoes into England, and was here baptized without the plaintiff's consent, and at the time when the trespass was alledged, was in the defendant's service, and had 6 l. a year for wages. In the argument of this case, three questions were made. One was, whether the facts in the verdict sufficiently shewed that the plaintiff had ever had a vested property in the negro (x): another was, whether that property was not devested by bringing the negro into England: and the third was, whether *trespass* for taking a man of the value of 100l. was the proper action. After several arguments, the

(u) 1 L. Raym. 146. Carth. 396. et 5 Mod. 186.

(x) The facts which occasioned this question, I have omitted in the state of the case; because they are not material to the question of slavery in England.

court gave judgment against the plaintiff. But I do confess, that in the Reports we have of the case, no opinion on the great question of slavery is mentioned; it becoming unnecessary to declare one, as the court held, that the action should have been an action to recover damages for the *loss of the service*, and not to recover the *value of the slave*. Of this case, therefore, I shall not attempt to avail myself.

BUT the next case, which was an action of *indebitatus assumpfit* in the King's Bench by Smith against Browne and Cowper (xx), is more to the purpose. The plaintiff declared for 20l. for a negro sold by him to the defendants in *London*; and on motion in arrest of judgment, the court held, that the plaintiff should have averred in the declaration, that *the negro at the time of the sale was in Virginia, and that negroes by the laws and statutes of Virginia are saleable* (y). In these words there is a direct opinion against the slavery of negroes in England: for if it was lawful, the negro would have been saleable and transferrable here, as well as in *Virginia*; and stating that the negro at the time

(xx) 2. Salk. 666. The case is not reported in any other book; and in Salkeld the time when the case was determined is omitted. But it appears to have been in the King's Bench, by the mention of Lord Ch. J. Holt and Mr. J. Powell.

(y) The Reporter adds, that the court directed, that the plaintiff should *amend* his declaration. But after verdict it cannot surely be the practice to permit so *essential* an amendment; and therefore the Reporter must have misunderstood the court's direction.

of the sale was in *Virginia*, could not have been essential to the sufficiency of the *declaration*. But the influence of this case on the question of slavery, is not by mere inference from the court's opinion on the plaintiff's mode of declaring in his action. The language of the judges, in giving that opinion, is remarkably strong against the slavery of negroes, and every other *new* slavery attempted to be introduced into England. Mr. Justice Powell says, *In a villein the owner has a property; the villein is an inheritance; but the law takes no notice of a negro.* Lord Chief Justice Holt is still more explicit; for he says, that *one may be a villein in England; but that as soon as a negro comes into England, he becomes free.* The words of these two great judges contain the whole of the proposition, for which I am contending. They admit property in the *villein*; they deny property in the *negro*. They assent to the *old* slavery of the *villein*; they disallow the *new* slavery of the *negro*.

I BEG leave to mention one other case, chiefly for the sake of introducing a strong expression of the late Lord Chancellor *Northington*. It is the case of *Shanley and Harvey*, which was determined in Chancery some time in March 1762. The question was between a *negro* and his former master, who claimed the benefit of a *donatio mortis causa* made to the *negro* by a lady, on whom he had attended as servant for several years by the permission of his master. Lord Northington, as I am informed by a friend

friend who was present at the hearing of the cause, disallowed the master's claim with great warmth, and gave costs to the negro. He particularly said, *As soon as a man puts foot on English ground, he is free: a negro may maintain an action against his master for ill usage, and may have a habeas corpus, if restrained of his liberty* (z).

HAVING observed upon all the cases, in which there is any thing to be found relative to the present lawfulness of slavery in England; it is time to consider the force of the several objections, which are likely to be made, as well to the inferences I have drawn from the determined cases, as to the general doctrine I have been urging,

Objections likely to be made to the arguments against the present lawfulness of slavery in England, stated and answered.

(z) In the above enumeration of cases, I have omitted one, which was Sir Thomas Grantham's case in the Common-Pleas, Hillary 2 & 3, Jam. 2. Being short, I shall give it in the words of the Report. *He bought a monster in the Indies, which was a man of that country, who had the shape of a child growing out of his breast as an excrescence all but his head. This man he brought hither, and exposed to the sight of the people for profit. The Indian turns Christian and was baptized, and was detained from his master, who brought a homine replegiando. The sheriff returned, that he had replevied the body; but doth not say the body in which Sir Thomas claimed a property; whereupon he was ordered to amend his return, and then the court of Common Pleas bailed him.* 3 Mod. 120.---It doth not appear, that the return was ever argued, or that the court gave any opinion on this case; and therefore nothing can be inferred from it.

1. It may be asked, Why it is that the law should permit the *ancient* slavery of the *villein*, and yet disallow a slavery of *modern* commencement?

To this I answer, that *villeinage* sprung up amongst our ancestors in the early and barbarous state of society; that afterwards more humane customs and wiser opinions prevailed, and by their influence rules were established for checking the progress of slavery; and that it was thought most prudent to effect this great object, not *instantaneously* by declaring every slavery unlawful, but *gradually* by excluding a *new* race of slaves, and encouraging the voluntary emancipation of the *ancient* race. It would have seemed an *arbitrary* exertion of power, by a retrospective law to have annihilated property, which, however *inconvenient*, was *already* vested by lawful means; but it was policy without injustice to restrain *future* acquisitions of it.

2. It may be said, that as there is nothing to hinder persons of free condition from becoming slaves by acknowledging themselves to be *villeins*, therefore a *new* slavery is not contrary to law.

THE force of this objection arises from a supposition, that *confession* or *acknowledgment* of *villeinage* is a legal mode of creating slavery; but on examining the nature of the *acknowledgment*, it will be evident, that the law doth

doth not permit villenage to be acknowledged for any such purpose. The term itself imports something widely different from *creation*; the *acknowledgment*, or *confession* of a thing, implying that the thing acknowledged or confessed has a *previous existence*; and in all cases, criminal as well as civil, the law *intends*, that no man will confess an untruth to his own disadvantage, and therefore never requires proof of that which is admitted to be true by the person interested to deny it. Besides, it is not allowable to institute a proceeding for the *avowed* and *direct* purpose of acknowledging villenage; for the law will not allow the confession of it to be received, except where villenage is alledged in an *adverse* way: that is, only (a) when villenage was pleaded by the lord *against* one whom he claimed as his villein; or by the villein *against* strangers, in order to excuse himself from defending actions to which his lord only was the proper party; or when *one* villein was produced to prove villenage against *another* of the *same blood* who denied the slavery. If the *acknowledgment* had been permitted as a *creation* of slavery, would the law have required, that the confession should be made in a mode so *indirect* and *circuitous* as a suit professedly commenced for a *different purpose*? If confession is a *creation* of slavery, it certainly must be deemed a *creation* by consent; but if confession had been adopted as a *voluntary creation* of slavery, would the law have restrained the courts of justice from receiving confession, except in an *adverse* way? If confession had been al-

(a) Co. Litt. 122. b.

lowed as a mode of creating slavery, would the law have received the confession of one person as good evidence of slavery in another of the *same blood*, merely because they were descended from the same common ancestor? This last circumstance is of itself decisive; because it necessarily implied, that a slavery confessed was a slavery by descent.

ON a consideration of these circumstances attending the acknowledgment of villainage, I think it impossible to doubt its being merely a *confession* of that *antiquity* in the slavery, which was otherwise necessary to be *proved*. But if a doubt can be entertained, the opinions of the greatest lawyers may be produced to remove it, and to shew that, in consideration of law, the person *confessing* was a villein by *descent* and in *blood*. In the year-book of 43. E. 3 (b). it is laid down as a general rule, *that when one claims any man as his villein, it shall be intended always that he is his villein by reason of stock*. Lord Chief Justice Hobart considers villainage by confession in this way, and says (c), *the confession in the court of record is not so much a creation, as it is in supersposal of law a declaration of rightful villainage before, as a confession in other actions*. Mr. Serjeant Rolle too, in his abridgment, when he is writing on villainage by acknowledgment, uses very strong words to the same effect. He says in one place (d), *it seems intended that title is*

(b) 34. E. 3. 4.

(c) Heb. 99.

(d) 2. Ro. Abr. 732. pl. 6.

is made that he should be a villein by descent; and in another place (e), it seems intended that title is made by prescription, wherefore the issue should also be villeins. The only instance I can find of a *nativo babendo*, founded on a previous acknowledgment of villenage, is a strong authority to the same purpose. In the 19th of Edward 2. (f) the dean and chapter of London brought a writ of *neisty* to recover a villein, and concluded their declaration with mentioning his acknowledgment of the villenage on a former occasion; instead of producing their *suit*, or witnesses, as was necessary when the villenage had not been confessed: but notwithstanding the acknowledgment, the plaintiffs alledged a *seizin* of the villein with *esplees*, or receipt of profits from him, in the usual manner. This case is another proof, that a *seizin previous to the acknowledgment* was the real foundation of the lord's claim, and that the acknowledgment was merely used to *estop* the villein from contesting a fact which had been before solemnly confessed. However, I do admit, that under the form of acknowledgment there was a *possibility of collusively creating slavery*; but this was not practicable without the concurrence of the person himself who was to be the sufferer by the fraud; and it was not probable, that *many persons* should be found so base in mind, so false to themselves, as to sell themselves and their posterity, and to renounce the common protection and benefit of the law for a *bare mainte-*

(e) 2. Ro. Abr. 732. pl. 8.

(f) Fitzh. Abr. Villenage 34.

hance, which, by the wise provision of the law in this country, may always be had by the most needy and distressed, on terms infinitely less ignoble and severe. It should also be remembered, that such a collusion could scarce be wholly prevented, so long as any of the *real and unmanumitted descendants* from the antient villeins remained; because there would have been the same possibility of defrauding the law on the actual trial of villenage, as by a *previous acknowledgment*. Besides, if collusions of this sort had ever become frequent, the Legislature might have prevented their effect by an *extraordinary remedy*. It seems, that antiently such frauds were sometimes practised; and that free persons, in order to evade the trial of actions brought against them, alledged that they were villeins to a stranger to the suit, which, on account of the great improbability that a confession so disadvantageous should be void of truth, was a plea the common law did not suffer the plaintiff to deny. But a remedy was soon applied, and the statute of (g) 37. E. 3. was made, giving to the plaintiff a liberty of contesting such an allegation of villenage. If in these times it should be endeavoured to revive domestic slavery in England, by a like *fraudulent confession* of villenage, surely so unworthy an attempt, so gross an evasion of the law, would excite in this court the strongest disapprobation and resentment, and from parliament would receive an *immediate and effectual remedy*; I mean, a law *declaring* that villenage, as is most *notoriously* the

fact, has been long expired for want of real objects; and therefore making void all precedent confessions of it, and prohibiting the courts of justice from recording a confession of villainage in future.

(2.) It may be objected, that though it is not usual in the wars between Christian powers to enslave prisoners, yet that some nations, particularly the several states on the coast of Barbary, still adhere to that inhuman practice; and that in case of our being at war with them, the law of nations would justify our king in retaliating; and consequently, that the law of England has not excluded the possibility of introducing a new slavery, as the arguments against it suppose.

But this objection may be easily answered; for if the arguments against a new slavery in England are well founded, they reach the king as well as his subjects. If it has been at all times the policy of the law of England not to recognize any slavery but the antient one of the villein, which is now expired; we cannot consistently attribute to the executive power a prerogative of rendering that policy ineffectual. It is true, that the law of nations may give a right of retaliating on an enemy, who enslaves his captives in war; but then the exercise of this right may be prevented or limited by the law of any particular country. A writer of eminence (b) on the law of nations, has a passage very applicable to

(b) Rutherf. Inst. Nat. L. v. 2, p. 576.

this subject. His words are, *If the civil law of any nation does not allow of slavery, prisoners of war who are taken by that nation cannot be made slaves.* He is justified in his observation not only by the reason of the thing, but by the practice of some nations, where slavery is as unlawful as it is in England. The Dutch (i) when at war with the Algerines, Tunisians, or Tripolitans, make no scruple of retaliating on their enemies; but slavery not being lawful in their European dominions, they have usually sold their prisoners of war as slaves in Spain, where slavery is still permitted. To this example I have only to add, that I do not know an instance, in which a prerogative of having captive slaves in England has ever been assumed by the crown; and it being also the policy of our law not to admit a new slavery, there appears neither reason nor fact to suppose the existence of a royal prerogative to introduce it.

(i) *Quia ipsa servitus inter Christianos ferè excedit, et quoque non utimur in hostes captos. Possimus tamen, si ita placet, immutum quandoque adversus eos, qui in nos utuntur. Quare ei Belgæ quos Algerienses, Tunitanos, Tripolenses in Oceano aut Mari Mediterraneo capiunt, solent in servitutem Hispanis vendere, nam ipsi Belgæ servos non habent, nisi Asia Africâ et Americâ. Quin anno 1661, Ordines Generales Admiralio suo mandarunt, piratos captos in servitutem venderet. Idemque observatum est anno 1664. Bynkershoek Quest. Jur. Publ. lib. 1. cap. 3.*

4. ANOTHER objection will be, that there are English acts of parliament, which give a sanction to the slavery of negroes ; and therefore that it is now lawful, whatever it might be *antecedently* to those statutes.

THE statutes in favour of this objection are the 5 Geo. 2. c. 7. (k) which makes negroes in *America* liable to all debts, simple-contract as well as specialty, and the statutes regulating the African trade, particularly the 32. Geo. 2. c. 31. which in the preamble recites, that the trade to Africa is advantageous to Great Britain, and necessary for supplying it's colonies with negroes. But the *utmost* which can be said of these statutes, is, that they *impliedly* authorize the slavery of negroes in *America*; and it would be a strange thing to say, that permitting slavery *there*, includes a permission of slavery *here*. By an unhappy concurrence of circumstances, the slavery of negroes is thought to have become necessary in *America*; and therefore in *America* our Legislature has permitted the slavery of negroes. But the slavery of negroes is unnecessary in *England*, and therefore the Legislature has not extended the permission of it to *England*; and not having done so, how can this court be warranted to make such an extension ?

5. THE slavery of negroes being admitted to be lawful *now* in *America*, however questionable it's *first*

(k) 5 G. 2. c. 7. s. 4.

introduction there might be, it may be urged, that the *lex loci* ought to prevail, and that the master's property in the negro as a slave having had a lawful commencement in *America*, cannot be justly varied by bringing him into *England*.

I SHALL answer this objection by explaining the limitation, under which the *lex loci* ought always to be received. It is a general rule (*l*) that the *lex loci* shall not prevail, if great inconveniences will ensue from giving effect to it. Now I apprehend, that no instance can be mentioned, in which an application of the *lex loci* would be more inconvenient, than in the case of slavery. It must be agreed, that where the *lex loci* cannot have effect without introducing the thing prohibited in a degree either as great, or nearly as great, as if there was no prohibition, there the greatest inconvenience would ensue from regarding the *lex loci*, and consequently it ought not to prevail. Indeed, by receiving it in a case so circumstanced, the end of a prohibition would be frustrated, either entirely or in a very great degree; and so the prohibition of things the most pernicious in their tendency, would become vain and fruitless. And what greater inconveniences can we imagine, than those, which would necessarily result from such an unlimited sacrifice of the *municipal* law to the law of a *foreign*

(*l*) See the chapter *de conflictu legum diversarum in diversis imperiis*, in Huber, *Prælect.* p. 538.

country? I will now apply this *general* doctrine to the *particular* case of our own law concerning slavery. Our law prohibits the *commencement* of domestic slavery in *England*, because it disapproves of slavery, and considers its operation as dangerous and destructive to the whole community. But would not this prohibition be *wholly* ineffectual, if slavery could be *introduced* from a *foreign* country? In the course of time, though perhaps in a progress less rapid, would not domestic slavery become as general, and be as completely revived in *England* by *introduction* from our *colonies* and from *foreign countries*, as if it was permitted to revive by *commencement here*? and would not the same inconveniences follow? To prevent the revival of domestic slavery *effectually*, its introduction must be resisted *universally*, without regard to the place of its *commencement*; and therefore in the instance of slavery, the *lex loci* must yield to the *municipal* law. From the fact of there never yet having been any slavery in this country except the *old* and *now expired* one of *villenage*, it is evident, that hitherto *our law* has *uniformly* controlled the *lex loci* in this respect; and so long as the *same policy* of excluding slavery is retained by the law of *England*, it *must* continue intitled to the *same preference*. Nor let it be thought a peculiar want of complaisance in the law of *England*, that, disregarding the *lex loci* in the case of slaves, it gives immediate an entire liberty to them, when they are brought here from another country. Most of the

other European states, in which slavery is discon-
tenanced, have adopted a like policy.

IN Scotland domestic slavery is (*m*) unknown, except so far as regards the (*n*) coal-hewers and salt-makers, whose condition, it must be confessed, bears some resemblance to slavery; because all who have once acted in either of these capacities, are compellable to serve, and fixed to their respective places of employment during life. But with this single exception, there is not the least vestige of slavery; and so jealous is the Scotch law of every thing tending to slavery, that it has been held to disallow contracts of service for life, or for a very long term; as, for sixty years (*o*). However, no particular case has yet happened, in which it has been necessary to decide, whether a slave of another country acquires freedom on his arrival in Scotland. In 1757 this question was depending in the court of session in the case of a negro; but

(*m*) See Crag. Jus Feud. lib. 1. dieges. 11. s. 32.—Stair's Instit. b. 1. t. 2. s. 11, 12.

(*n*) Forb. Instit. Part 1. b. 2. t. 3.—Macdoual. Instit. vol. 1. p. 68.

(*o*) Macdoual. Instit. vol. 1. p. 68. But I must observe, that in the case relied on by Mr. Macdoual, the *term* of service was not the *only* material circumstance. The contract was between the masters and the crews of some fish boats; the latter binding themselves for a yearly allowance to serve in their respective boats during three times nineteen years, so that *not one of them, during all that time, could remove from a particular village, or so much as from one boat to another*. See Dict. Decis. tit. *Pactum illicitum*.

the negro happening to die during the pendency of the cause, the question was not * determined. But when it is considered, that in the time of Sir Thomas Craig, who wrote at least 150 years ago, slavery was even then a thing unheard of in Scotland, and that there are no laws (*p*) to regulate slavery, one can scarce doubt what opinion the lords of session would have pronounced, if the negro's death had not prevented a decision.

In the *United Provinces* slavery having fallen into disuse (*q*), all their writers agree, that slaves from another country become free the moment they enter into the Dutch territories (*r*). The same custom prevails

* Wall. Instit. Law of Scotl. chap. on Master and Servant.

(*p*) Sir Thomas Craig, mentioning the English villenage, says,—*Nullus est apud nos ejus usus, et inauditum nomen, nisi quod nonnulla in libro Regiae Majestatis de nativis et ad libertatem proclamatis proponantur; quae et ab Anglorum moribus sunt recepta, et nunquam in usum nostrum deducita.* Crag. Jus Feud. lib. 1. dieges. 11. f. 32.

(*q*) *Belgæ servos non habent, nisi in Afîâ, Africâ, et Americâ.* Bynkersh. Quæst. Jur. Publ. lib. 1. c. 3.

Another great Dutch lawyer adds, *Nec cuquam mortalium nunc licet se se vendare, aut aliâ ratione servituis jure semel alteri addicere.* Voet Commentar. ad Pandect. lib. 1. tit. 5. f. 3.

(*r*) *Servitus paulatim ab usu recessit, ejusque nomen 'bodie apud nos exolevit; adeo quidem ut servi, qui aliunde hoc adducuntur, simul ac imperii nostri fines intrârunt, invitis ipsorum dominis ad libertatem proclamare possint: id quod et aliorum Christianorum gentium moribus receptum est.* Grænewegen de Leg. Abrogat. in Hollandiâ, &c. p. 5.

John Voet, in the place cited in the preceding note, expresses himself to the same effect,

in some of the neighbouring countries, particularly *Brabant*, and other parts of the *Austrian Netherlands*; and Gudelinus, an eminent civilian, who was formerly professor of law at Louvain in Brabant, relates from the annals of the supreme counsel at Mechlin, that in the year 1531, an application for apprehending and surrendering a fugitive slave from Spain, was on this account rejected (s).

IN France the law is particularly explicit against regarding the *lex loci* in the case of domestic slavery; and though, in some of the provinces, a remnant of the antient slavery is still to be seen in the persons of the *serfs*, or *gens de main-morte*, who are attached to particular lands (t), as villeins regardant formerly were in England; yet all the writers on the law of France agree, that the moment a slave arrives there from another country he acquires liberty, not in consequence of any written law, but merely by long usage having the force of law. There are many remarkable instances in which this rule against the admission of slaves from foreign countries has had effect in France. Two are mentioned by (u) Bodin; one being the case of a foreign merchant who

(s) Gudelin. de Jar. Noviss. lib. 1. c. 5. et Vinn. in Instit. lib. 1. tit. 3. p. 32. edit. Heinecc.

(t) See Instit. au Droit Franc. par M. Argou, ed. 1753. lib. 1. chap. 1. p. 4.

(u) Bodin. de Republic. lib. 1. cap. 5. de imperio herili. See several other instances mentioned in the Negro cause in the 13th volume of the *Causes Celebres*.

had purchased a slave in Spain, and afterwards carried him into France ; the other being the case of a Spanish ambassador, whose slave was declared free, notwithstanding the high and independent character of the slave's owner. This latter case has been objected to by some writers (*w*) on the *law of Nations*, who do not disapprove of the *general principle* on which liberty is given to slaves brought from foreign countries, but only complain of it's application to the *particular case* of an ambassador. But, on the other hand, Wicquefort (*x*) blames the States of Holland for not following the example of the French, in a case which he mentions. After the establishment of the French colonies in South America, the kings of France thought fit to deviate from the strictness of the antient French law, in respect to slavery, and in them to permit and regulate the possession of negro slaves. The first edict for this purpose is said to have been one in April 1615, and another was made in May 1685 (*y*) which is not confined to negroes, but regulates the general police of the French islands in America, and is known by the name of the *Code noir*. But notwithstanding these edicts, if

(*w*) Kirchner. de Legat. lib. 2. c. 1. num. 233.—and after him Bynkershoek Juge Compet. des Ambassad. ed. par Barbeyr. c. 15. f. 3.

(*x*) Wicquefort's Ambassador, Engl. ed. p. 268.

(*y*) Decisions Nouvelles, par M. Denisart, tit. Negres.—Denisart mentions, that the edict of 1685 is registered with the sovereign counsel at Domingo, but has never been registered in any of the French parliaments.

negro slaves were carried from the French American islands into France, they were intitled to the benefit of the ancient French law, and became free on their arrival in France (z). To prevent this consequence, a third edict was made in October 1716, which permits the bringing of negro slaves into France from their American islands. The permission is granted under various restrictions; all tending to prevent the long continuance of negroes in France to restrain their owners from treating them as property whilst they continue in their mother country, and to prevent the importation of fugitive negroes; and with a like view, a royal declaration was made in Dec. 1738(a), containing an exposition of the edict of 1716, and some additional provisions. But the antient law of France in favour of slaves from another country, still has effect, if the terms of the edict of 1716, and of the declaration of 1738, are not strictly complied with; or if the negro is brought from a place, to which they do not extend. This appears from two cases adjudged since the edict of 1716. In one (b) of them, which happened in 1738, a negro had been brought from the island of Saint Domingo without observing the terms

(z) *Nouvelles Decisions* par M. Denisart, tit. Negres, s. 27.

(a) M. Denisart observes, that the edict of 1716, and the declaration of 1738, do not appear to have been ever registered by the parliament of Paris, because they are considered as contrary to the common law of the kingdom.—See his *Nouvelles Decisions*, tit. Negres.

(b) See *Causes Celebres*, vol. 13. p. 492.

of the edict 1716; and in the other (*d*), which was decided so late as in the year 1758, a slave had been brought from the East Indies, to which the edict doth not extend: and in both these cases the slaves were declared to be free.

SUCH are the examples drawn from the laws and usages of other European countries; and they fully evince, that wherever it is the policy to discountenance slavery, a disregard of the *lex loci*, in the case of slavery, is as well justified by general *practice*, as it is really founded on *necessity*. Nor is the *justice* of such proceeding less evident; for how can it be unjust to deprive the master's property in his slave, when he is carried into a country, in which, for the wisest and most humane reasons, such property is known to be prohibited, and consequently cannot be lawfully introduced?

6. It may be contended, that though the law of England will not receive the negro as a slave, yet it may suspend the severe qualities of the slavery whilst the negro is in England, and preserve the master's right over him in the relation of a servant, either by presuming a contract for that purpose, or, without the aid of such a refinement, by compulsion of law grounded on the condition of slavery in which the negro was previous to his arrival here.

(d) Nouvelles Décisions par M. Denisart, tit. Negres, n° 147.

But insuperable difficulties occur against modifying and qualifying the slavery by this artificial refinement. In the present case, at all events such a modification cannot be allowable; because in the return, the master claims the benefit of the relation between him and the negro in the full extent of the original slavery. But for the sake of shewing the futility of the argument of modification, and in order to prevent a future attempt in the masters of negroes to avail themselves of it, I will try its force.

As to the presuming a contract of service against the negro, I ask at what time is it's commencement to be supposed? If the time was before the negro's arrival in England, it was made when he was in a state of slavery, and consequently without the power of contracting. If the time presumed was subsequent, the presumption must begin the moment of the negro's arrival here, and consequently be founded on the mere fact of that arrival, and the consequential enfranchisement by operation of law. But is not a slavery determined *against* the consent of the master, a strange foundation for presuming a contract between him and the slave? For a moment, however, I will allow the reasonableness of presuming such a contract; or I will suppose it to be reduced into writing; but then I ask what are the terms of this contract? To answer the master's purpose, it must be a contract to serve the master here; and when he leaves this country to return with him into America, where the slavery will again attach upon the negro. In plain

plain terms, it is a contract to go into slavery whenever the master's occasions shall require. Will the law of England disallow the introduction of slavery, and therefore emancipate the negro from it ; and yet give effect to a contract founded solely upon slavery, in slavery ending ? It is impossible, that the law of England can be so insulting to the negro, so inconsistent with itself.

THE argument of modification, independantly of contract, is equally delusive.—There is no known rule by which the court can guide itself in a *partial* reception of slavery. Besides, if the law of England would receive the slavery of the negro in any way, there can be no reason why it should not be admitted in the same degree as the slavery of the villein : but the argument of modification necessarily supposes the contrary ; because, if the slavery of the negro was received in the same extent, then it would not be necessary to have recourse to a *qualification*. But there is one other reason still more repugnant to the idea of modifying the slavery. If the law of England would modify the slavery, it would certainly take away it's *most* exceptionable qualities, and leave those which are *least* oppressive. But the modification required will be insufficient for the master's purpose, unless the law leaves behind a quality the *most* exceptionable, odious, and oppressive ; an *arbitrary* power of reviving the slavery in it's full extent, by removal of the negro to a place, in which the slavery

will again attach upon him with all its *original* severity (e).

FROM this examination of the several objections in favour of slavery in England, I think myself well warranted to observe, that instead of being weakened, the arguments against slavery in England have derived an additional force. The result is, not merely that negroes become free on being brought into this country, but that the law of England confers the *gift* of *liberty intire* and *unincumbered*; not in *name* only, but *really* and *substantially*; and consequently, that Mr. Steuart cannot have the least right over Sommersett the negro, either in the *open* character of a slave, or in the *disguised* one of an ordinary servant.

(2) Point
on Mr. Steu-
art's auth-
ority to en-
force his
right to the
negro by
transporting
him out of
England.

(2.) In the outset of the argument I made a second question on Mr. Steuart's authority to enforce his right,

(e) This answer to the argument of modification, includes an answer to the supposition, that an action of *trespass per quod ser-
vitiuum amisi*, will lie for loss of a negro's service. I am per-
suaded, that the case in which that remedy was loosely suggested,
was one in which the question was about a negro *being out of
England*. See the case of *Smith and Gould*. 2. Salk. 667.—Another
writ just hinted at in the same case, is the writ of *trespass, quare
captivum suum cepit*; which is not in the least applicable to the
negro, or any other slave. It supposes the plaintiff to have had
one of the king's enemies in his custody as a prisoner of war, and
to have had a right of detaining him till payment of a ransom.
See Reg. Br. 102; b. and 2. Salk. 667.

if he has any, by transporting the negro out of England. Few words will be necessary on this point, which my duty as counsel for the negro requires me to make, in order to give him *every possible* chance of a discharge from his confinement, and not from any doubt of success on the question of slavery.

If in England the negro continues a slave to Mr. Steuart, he must be content to have the negro subject to those limitations which the laws of villeinage imposed on the lord in the enjoyment of his property in the villein; there being no other laws to regulate slavery in this country. But even those laws did not permit that high act of dominion which Mr. Steuart has exercised; for they restrained the lord from forcing the villein out of England. The law, by which the lord's power over his villein was thus limited, has reached the present times. It is a law * made in the time of the First William, and the words of it are, *prohibemus ut nullus venedat hominem extra patriam (f)*.

If Mr. Steuart had claimed the negro as a servant by contract, and in his return to the *babeas corpus* had stated a written agreement to leave England as Mr. Steuart should require, signed by the negro, and made

* Wilk, Leg. Saxon. p. 229, & cap. 65, Leg. Gulielm. I.

(f) This law furnishes one more argument against slavery imported from a foreign country. If the law of England did not disallow the admission of such a slavery, would it restrain the master from taking his slave out of the kingdom?

after his arrival in England, when he had a capacity of contracting, it might then have been a question, Whether such a contract in writing would have warranted Mr. Stewart in compelling the performance of it, by forcibly transporting the negro out of this country? I am myself satisfied, that no contract, however solemnly entered into, would have justified such violence. It is contrary to the genius of the English law, to allow any enforcement of agreements or contracts, by any other compulsion, than that from our courts of justice. The exercise of such a power is not lawful in cases of agreements for property; much less ought it to be so forenforcing agreements against the person. Besides, is it reasonable to suppose that the law of England would permit *that against the servant by contract*, which is denied against the slave? Nor are great authorities wanting to acquit the law of England of such an inconsistency, and to shew that a contract will not warrant a compulsion by imprisonment, and consequently much less by transporting the party out of this kingdom. Lord Hobart, whose extraordinary learning, judgment, and abilities, have always ranked his opinion amongst the highest authorities of law, expressly says (g), that the body of a freeman cannot be made subject to distress or imprisonment by contract, but only by judgment. There is, however, one case, in which it is said that the performance of a service to be done abroad, may be compelled without the intervention of a court of justice; I mean,

(g) Hob. 61.

the case of an *infant-apprentice*, bound by proper indentures to a mariner or other person, where the nature of the service imports, that it is to be done out of the kingdom (*b*), and the party, by reason of his *infancy*, is liable to a coercion not justifiable in *ordinary* cases. The *habeas corpus* act (*i*) goes a step further; and persons who, *by contract in writing*, agree with a merchant or owner of a plantation, or any other person, to be transported beyond sea, and receive earnest on such agreements, are excepted from the benefit of that statute. I must say, that the exception appears very *unguarded*; and if the law, as it was *previous* to this statute, did intitle the subject to the *habeas corpus* in the case which the statute excepts, it can only operate in excluding him in that particular case from the *additional provisions* of the statute, and cannot, I presume, be justly extended to deprive him of the *habeas corpus*, as the common law gave it before the making of the statute.

UPON the whole, the return to the *habeas corpus*: Conclusion.
the present case, in whatever way it is considered, whether by inquiry into the foundation of Mr. Steuart's right to the person and service of the negro, or by reference to the violent manner in which it has been attempted to enforce that right, will appear equally un-

(*b*) Hob. 134.

(*i*) 31. Chz. II. c. 2. s. 13.

worthy of this court's approbation. By condemning the return, the revival of domestic slavery will be rendered as impracticable by *introduction* from our colonies and from other countries, as it is by *commencement* here. Such a judgment will be no less conducive to the public advantage, than it will be conformable to natural justice, and to principles and authorities of law; and this court, by effectually obstructing the admission of the new slavery of *negroes* into England, will in these times reflect as much honor on themselves, as the great judges, their predecessors, formerly acquired, by contributing so uniformly and successfully to the suppression of the old slavery of *villanes*.

R I N I S. *Etiam si loquimur*



卷之三

卷之三

